United States Court of Appeals for the Second Circuit

APPENDIX

77-7037

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In The

United States Court of Appeals

For The Second Circuit

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NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX - VOLUME 10

CARL E. PERSON
Attorney for Plaintiffs-Appellants
132 Nassau Street
New York, New York 10038

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
Attorneys for Defendants-Appellees James M. Roche, Frederic G. Donner, General Motors Corp. and General Motors Acceptance Corp.
345 Park Avenue
New York, New York 10022

HETZELT, WATSON, McGARVEY & HETZELT
Attorneys for Defendants-Appellees Hamister-Gillogly Chevrolet, Inc. and Niagara Frontier Automobile Dealers Association, Inc.
1904 Liberty Bank Building
Buffalo, New York 14202

JOSEPH C. TISDALE
Attorney for Defendant-Appellee Bob Bain Chevrolet
300 Statler Office Building
Buffalo, New York 14202

BRENNAN, CALLAHAN, TESSEYMAN,
ZELMAN, RUNFOLA & NOBLE
Attorneys for Defendant-Appellee Paul Batt Buick, Inc.
1360 Statler Hilton Hotel
Buffalo, New York 14202

SIDNEY A. WEISBERG
Attorney for Defendant-Appellee Paragon Oldsmobile, Inc.
225 Broadway
New York, New York 10007

BORINS & SNITZER
Attorneys for Defendant-Appellee Glen Campbell Chev., Inc.
1718 Statler Hilton Hotel
Buffalo, New York 14202

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you know, a kit to give to that broker.

Q He had what?

A A kit of materials and sign and everything else that was necessary for him to go into the business.

Q And is it your testimony that the area broker got nothing from the broker to whom he sold the franchise except this $625 that you are talking about?

A That's right.

(Mr.Kleinbard read from page 9 of Defendants' Exhibit F-6 in evidence.)

Q Isn't it a fact, Mr. Maiorana, that the area broker charged the broker anything from $1500 to $5000 for his franchise?

A No.

Q Is it true that the area broker got $50 for every automobile he sold?

A Yes.

Q Nabcor of course met with peopel who expressed interest in buying franchises, did it not?

A Yes.

Q And it made various representations

to the people who purchased those franchises, did it not?

A I'd have to know what you are alluding to, Mr. Kleinbard.

Q You told them various things about how they would operate, what they would earn, what their profits would be, etc., did you not, and how to go about selling?

A We explained the system to them primarily before we went into that.

Q As a matter of fact, you put out a manual, didn't you, which made suggestions to master brokers and area brokers about how to sell franchises to others?

A There was a manual that explained to the master brokers and area brokers various questions that they may be asked and the answers to some of these questions.

Q That's what I'm referring to.

A Yes.

Q You did put out such a manual, correct, containing proposed questions and answers?

A Yes, based on questions that had been asked in the past?

Q Correct.

MR. KLEINBARD: I'm going to offer as Defendants' D-6 a copy of that manual, which was previously identified as Mr.Maiorana's Exhibit No. 40 at his examination before trial.

THE COURT: D-6?

MR. KLEINBARD: Yes, your Honor.

MR. PERSON: No objection.

THE COURT: Received.

(Defendants' Exhibit D-6 was received in evidence.)

xx Q Mr. Maiorana, do you have a copy?

A I have a copy, but I cannot identify this by this copy as a manual that we gave to our master distributors.

(Mr. Kleinbard read from page 2 of Defendants' Exhibit D-6 in evidence.)

Q Mr. Maiorana, was it distributed even later into 1970 and later?

A I assume so. I can't read this, 1969, but if you say it is there.

Q I'm sorry, I cannot hear you, Mr. Maiorana.

A If it says 1969 --

Q My question is whether it was not distributed --

A Afterwards?

Q -- later from '69 up to about 1973.

A Yes, we distributed it after 1969.

(Mr. Kleinbard read from page 1 of Defendants' Exhibit D-6 in evidence.)

(Mr. Kleinbard read from page 29, question 14, of Defendants' Exhibit D-6 in evidence.)

THE WITNESS: I don't have the page yet, Mr. Kleinbard.

THE COURT: Page 29.

MR. KLEINBARD: Page 29. Sorry, Mr. Maiorana, I didn't know you weren't there.

THE WITNESS: I have a very close copy here.

THE COURT: We are all struggling, but we are getting by.

Okay.

THE COURT: Okay.

MR.KLEINBARD: Are you there now, Mr. Maiorana?

THE WITNESS: Yes.

MR. KLEINBARD: I'm just reading to the court and jury but I want you to follow me.

(Mr. Kleinbard read from page 29, question 14, of Defendants' Exhibit D-6 in evidence.)

THE COURT: I'm sorry, what questions did you read?

MR. KLEINBARD: I'm reading question 14 at the bottom.

THE COURT: Read question 13 and qustion 14.

MR. KLEINBARD: All right.

(Mr. Kleinbard read from page 29, questions 13 and 14, of Defendants' Exhibit D-6 in evidence.)

BY MR. KLEINBARD:

Q Now, I believe you testified on your direct testimony, Mr. Maiorana, that the method of selling automobiles which you commended to your brokers was that they should make five personal contacts, ten telephone calls, fifteen mail contacts, that is m-a-i-l, and twenty indirect contacts each day.

Now, the exhibit which I have distributed to your Honor and the jury, Defendants' Exhibit D-6, look at pages 14 and 15, and we will wait till you get there, and you will let me know, Mr. Maiorana, when you are there.

THE WITNESS: I have 14 and 15.

(Mr. Kleinbard read from pages 14-15 of Defendants' Exhibit D-6 in evidence.)

MR. KLEINBARD: Now, if you will turn to page 16, the next page, you say in this manual, Defendants' Exhibit D-6, at the top of the page, left-hand side --

THE WITNESS: What page are you on now?

MR. KLEINBARD: I'm on 16, the next page, top of the page, on the left-hand side, first line and following.

(Mr. Kleinbard read from page 16 of Defendants' Exhibit D-6 in evidence.)

9

Q It is obvious, is it not, Mr. Maiorana, that 25 sales a month amounts to 300 sales per year?

A Yes.

Q And there was never any Nabcor broker who so much as ordered that many cars from Nabcor in any given year, correct?

A That is correct, but that is a training manual and that explains what the system would produce if that happened.

Q I merely asked whether there was any Nabcor broker who so much as ordered as many as 300 cars per year, yes or no?

A No, they never had the opportunity to.

MR. KLEINBARD: I move to strike the latter part.

THE COURT: It is stricken.

Q Would you tell me approximately how many brokers did Nabcor have from 1967 through 1970?

A Approximately 250.

MR. KLEINBARD: I will call the Court's attention and the ladies and gentlemen of the jury's attention to two facts:

One, Nabcor's order journal, which is Plaintiffs' Exhibit 450, which Mr. Person stipulated early in the trial, page 264, represented substantially all of the orders received from Nabcor and, second --

THE COURT: What page?

MR. KLEINBARD: 264 of the transcript, it is colloquy between the Court and Mr. Person regarding this Exhibit 450.

So that we have been using Plaintiffs' Exhibit 450 as a substantially complete record of all of the cars ordered from brokers to Nabcor, and I have tabulated all of the orders set out in this order journal, Plaintiffs' Exhibit 450, and it indicates that there were not more than 699 orders received over the four-year period.

THE COURT: What period is embraced by Exhibit 450?

MR. KLEINBARD: I believe it is --

MR. PERSON: July 2, 1966, to the end.

MR. KLEINBARD: To the end of 1970.

THE COURT: Thank you. 699 ordered?

MR.KLEINBARD: That is correct, your Honor.

MR. PERSON: It goes into 1971, your Honor.

THE COURT: What is the date?

MR. KLEINBARD: I only counted through 1970, your Honor, I haven't gone past that. I am going to make that, if there is no objection, 700 orders.

THE COURT: Make it 700.

MR. KLEINBARD: Now, if we take the four-year period 1967 through 1970 and you divide 700 orders by the number of brokers which Mr. Maiorana indicated was 250, and then divide by four years, you would get an average of less than one car per year ordered.

So that the average broker operating under this so-called proven method of marketing during the four-year period from 1967 through 1970, ordered less than one car per year.

Q Now, sir, Nabcor submitted a statement to prospective brokers about the profits they could expect to make if they bought a Nabcor franchise, correct?

A Do you mean that was a question before or did you make a statement?

MR. KLEINBARD: I made a statement. Now I am asking a question.

THE WITNESS: Now you just made a misleading statement and I think the jury has a right to get an explanation on that based on our agreement with your Honor.

THE COURT: I don't know what this agreement is.

THE WITNESS: I thought, your Honor --

THE COURT: The point is, I specified a procedure to be used when Mr. Kleinbard seeks to read prior testimony for alleged impeachment purposes, and now, Mr. Kleinbard has stated to the jury what he states is the number of orders reflected during a certain time in Exhibit 450, and he has stated that he made some arithmetical calculations, and your attorney can question you about that, but we can't just have a lot of argument back and forth.

Now, Mr. Kleinbard, go ahead.

THE WITNESS: He is speaking of orders, not delivery.

MR. KLEINBARD: I just put a question to the witness. I just can't proceed until he subsides. Would you read the last question back?

THE COURT: Mr. Maiorana says you are mischaracterizing the document, and if you are, we better get that straightened out.

MR. KLEINBARD: It was stipulated to, your Honor, by Mr. Maiorana's counsel that this document, Exhibit 450, contains substantially all the orders which Nabcor received from its brokers. I even added one for the sake of simplicity.

MR. PERSON: Your Honor, in connection with that, I was thinking in terms of the whole ordering process, I wasn't thinking about aborted --

THE COURT: Look, Mr. Person, I asked you --

MR. KLEINBARD: Page 264, your Honor.

THE COURT: I wasn't using language loosely.

"The Court: I am asking you, could we go to that and find out the complete rundown of all the cars ordered from brokers to Nabcor?

"Mr. Person: Substantially complete, your Honor, but not totally."

Back at 262, there were questions to Mr. Maiorana:

"Q On your direct examination, so isn't it a fact, sir, that as you receive the orders from brokers, you being Nabcor, you first entered those orders in the book and then when you ordered the car from a dealer you entered that in the book?

"A I don't know if that was the arrangement, I couldn't, didn't keep this book."

Then I began asking questions about what the book was, because I assumed that although Mr. Maiorana says he didn't keep the book and didn't know what was in the book, I assume Mr. Person did know what was in the book, and is that answer incorrect, Mr. Person?

MR. PERSON: My understanding is there was a log kept of orders that Nabcor received, and I was thinking about the whole procedure, and I am not aware of any wholesale orders left out.

THE COURT: What do you mean by wholesale?

MR. PERSON: I am not aware of any massive orders.

THE COURT: I think we established by your statement on 264, or do you want to amend it?

MR. PERSON: I conceded that -- it begins with Broker No. 68, and therefore I have difficulties about the first 67 brokers, just looking at the document. The first 67 brokers, whatever they did, does not appear to be reflected in this log.

THE WITNESS: I don't know that we are talking about the same book.

THE COURT: I asked about this book, and you said you didn't know what was in the book.

THE WITNESS: There was the police book that was described. That reflects sales, not orders.

MR. PERSON: 451 and 452.

THE COURT: I really regret getting into this confusion. This refers to Exhibit 450.

MR. PERSON: That is this log --

THE COURT: The book we are talking about, let's not go around Robin's Barn. I want to know where you stand by the statement you made at the time I was questioning you, or do you wish to change it?

MR. PERSON: It represents --

THE COURT: Take it.

Do you want to stand by it or change it?

MR. PERSON: From the document I have seen it is substantially complete.

THE COURT: That is that.

MR. KLEINBARD: Would you have the stenographer read back my last question I put to Mr. Maiorana?

If there is any problem, I will rephrase it.

THE COURT: Why don't you rephrase it.

BY MR. KLEINSBARD:

Q Mr. Miaorana, Nabcor made statements to prospective brokers about the profits they might expect to make if they bought the Nabcor franchises, correct?

A There was a profit projection that we had, yes.

2 Q And I showed you --

A Based on a certain amount of cars sold.

Q I show you Defendants' Exhibit B-6, which is a document entitled "Area Distributor Profit Projection," and your answer to Interrogatories indicate that this document was distributed by Nabcor during and after the latter part of 1968 to prospective area brokers.

MR. KLEINBARD: I would like to offer it in evidence.

MR. PERSON: Could the witness please identify it and be able to explain what it is?

THE COURT: Well, I think what Mr. Kleinbard is saying is that in answers to interrogatories he identifies it, and if he is misquoting then you can correct him.

MR. PERSON: This is a Nabcor document --

MR. KLEINBARD: Mr. Person, for your benefit, it is answers to our second set of interrogatories in response to question No. 2.

THE COURT: He says who distributed it?

MR. KLEINBARD: Yes, your Honor. The question asked by each Nabcor franchisee to which Nabcor or any of its agents, employees, et cetera, gave a copy of each document hereto annexed as Exhibits 1 through 7.

It was Exhibit 6, and it continues, prior to the time each Nabcor franchisee entered into a franchise agreement with Nabcor or any Nabcor franchisee of Nabcor, and the answer is verified by Mr. Maiorana and says:

"According to plaintiff's best recollection Exhibits 1 through 7" -- and the one which I am offering is 6 mentioned in the Interrogatory 2 --"were shown or given to Nabcor franchisees prior to the time each franchisee entered into a franchise agreement with Nabcor or with the franchisee of Nabcor during the following periods".

And if you refer to Exhibit 6, it says from and after the latter part of 1968.

MR. PERSON: No objection.

THE COURT: Received.

(Defendants' Exhibit B-6 received in evidence.)

MR. KLEINBARD: This is Defendants' Exhibit B-6, your Honor, and ladies and gentlemen of the jury, and it states that the first year's minimum profits base on Phase I of the area distributor agreement program runs to $3620.

MR. PERSON: That is a characterization of something as actual rather than what it says, which is a projection.

MR. KLEINBARD: I am prepared to concede it was not actual.

MR. PERSON: Just say it to the jury.

THE COURT: We have it now.

MR. KLEINBARD: Now, it states at the top that the profit projection is based on ten operating brokers.

Q Was Nabcor's program of area distributors in existence at the time?

A I don't recall.

Q I read you from your examination before trial conducted on April 5, 1973, at page 1154, lines 8 to 18:

"Q When did you prepare approximately Exhibit 43" -- which is the same as Defendants' Exhibit B-6.

"A Probably prepared in 1968 or 1969, I don't recall.

"Q When you prepared it, did you have any records indicating that all or any of your area brokers were at that time in fact managing 10 or more brokers in operation?

"A When we prepared it, there were no area distributors in existence at that time. We were establishing a new program."

Mr. Maiorana, when Nabcor started passing out to prospective franchisees copies of Exhibit B-6, it had no idea whether its master brokers were making money or losing money?

A What time period are you speaking about, Mr. Kleinbard, in 1968?

Q Right, 1968.

A Turco, I believe, was making money at that time. I believe Strimple was starting his business. If we want to eliminate the interference and the leasing operation that he had to go into as a result of the interference, I thought he was making some money.

Q Some money?

A We had some that -- yes.

Q Is it summed up by Turco and Strimple, the only master brokers with respect to which you had any information whether they were making or losing money?

A I can't recall at this time, Mr. Kleinbard.

Q Can you recall what they were making, either one of them?

A No, I wasn't keeping the records and books even for Nabcor itself much less my master brokers. The profit projection is based on a certain performance like the manufacturers planning --

Q The answer is you have no information in terms of dollars and cents with respect to what Mr. Turco was making or what Mr. Strimple was making, and other than those two you can't even venture a guess as to whether any other master brokers were making or losing money; isn't that correct?

A Right at this time I really couldn't give you a definite answer to that. I just can't recall.

You are asking me about books. I didn't get their financial statements and records, Mr. Kleinbard, so I can't really answer that question.

THE COURT: Let us recess now, it is five to one, and I think that clock is wrong. We will recess for an hour and 20 minutes, and the jury can go and the lawyers will stay for just a minute.

(Jury left the courtroom.)

THE COURT: We have alluded once or twice during the trial to the question of damages, and at the conclusion of Mr. Maiorana's direct there was some questioning in a general way, which I believe was intended to relate to that which I struck because it was too vague and general.

But I am concerned about that, and I assume that in the course of all these years of preparation Mr. Person has gotten up a statement of the specifics of his client's damage claims. Is that a risky assumption?

MR. KLEINBARD: We have answers to interrogatories, your Honor, which I don't think are very soundly based, but he has given answers.

THE COURT: Well, as we are sitting here now, it would seem to me that you have to get into some building blocks for any damage claim, and let's start with a for instance.

We have some brokers who are plaintiffs and is it correct, Mr. Person, that they are claiming that they as part of their damage claim, they are claiming that they received certain orders from customers and attempted to obtain cars and were not able to obtain those cars? Is that at least --

MR. PERSON: Generally part, yes.

THE COURT: Now, let's get to that. With regard of plaintiff brokers and with regard to any non-plaintiff brokers which Nabcor seeks to refer to, I would like to know if you have specific information on this question of alleged auto sales that were frustrated, and it seems to me that would take the form hope-

rp14

fully of reference to specific orders which were obtained by the specific brokers that you wish to refer to, and then the evidence about those specific orders not being filled because of the fault of the alleged co-conspirators.

Now, what information do you have about that? Because we have this, you know we have repeated vague references to inability to get cars, but that doesn't do anything. The question is, where are the orders of the brokers and where is the evidence that they had the orders and they weren't filled?

MR. KLEINBARD: Your Honor, may I say one thing and then I will let Mr. Person answer you. The tabulation which I gave with respect to Plaintiffs' Exhibit 450 is predicated upon all of the orders. It is not predicated -- I did not attempt to narrow that by eliminating from orders what Nabcor claims was cancelled, so I gave them the benefit of every order that was on the books, whether cancelled or otherwise.

THE COURT: I'm pressing another question. Where is the evidence about specific orders in hand, with brokers that they were not able to satisfy, because of General Motors' other wrongdoings?

MR. PERSON: For the most part they are reflected in the log, your Honor.

THE COURT: . How many unfilled orders?

MR. PERSON: I have been compiling that information, and it seems to be in excess of 100. I'm finishing up with the compilation. But the orders by and large are referred to in here as cancelled orders.

THE COURT: So you are saying that out of the --

MR. KLEINBARD: Seven hundred.

THE COURT: -- out of the Exhibit 450 you derive 100 unfilled orders?

MR. PERSON: More than that, your Honor?

THE COURT: Well, what is the number?

MR. PERSON: I'm in the process of compiling it and I'm trying to eliminate some that are not ones that we are making claim about.

THE COURT: Can you give me a statement?

MR. PERSON: Probably about 125.

THE COURT: Let's say 125 subject to check. What would have been Nabcor's profit on those 125 orders?

MR. PERSON: The profit would not be very substantial, your Honor.

THE COURT: Have you really constructed your damage claim?

MR. PERSON: I know what the theory is, your Honor, it's the destruction of the business, No. 1, of setting up a distribution system, including franchisees, and the market for the selling of the automobiles that was lost as a result of that interference with this forming distribution system.

THE COURT: I would think as an initial proposition -- let me ask you this: Are you claiming or are you not claiming a specific amount of lost profits with respect to specific transactions? Are you making that kind of claim or are you not on behalf of any of the plaintiffs?

MR. PERSON: Yes, but that is a very small portion, specific orders that we can identify is a very small amount, your Honor.

THE COURT: Well, the thing that comes to me is this: It will, of course, be necessary to have the evidence to deal with even that small claim. Furthermore, as to the alleged destruction of business and what such an alleged business was worth, it would seem to me that the evidence about the number of orders these people were getting has a circumstantial evidence value in determining the potential. In other words, let's assume for the moment that General Motors destroyed the business of the plaintiffs, the automobile business, there is still a question, and a very substantial question, what was that business worth, and I would think that it would be necessary to see what were these brokers doing.

My impression is, on the class action motion or on some mother earlier, that there was a great deal of material in the record by way of depositions which showed the nature of the business of some of these brokers, and I won't try to claim to recall it, but it does seem to me that there is a vast difference between a broker who was working full time, who was trying to do this promotional business, who was seeking clients, who was receiving orders at a certain rate, and a broker who was doing something else.

When I say at a certain rate, the rate of orders is very important. What were the results of his labor and what would have been the results of his labor in the absence of the alleged General Motors interference, and that is something that you just don't create out of thin air. What was the fellow doing? What were these franchises doing? What was their potential, what was their actual, in the absence of General Motors' interference?

We are going to get a lot of evidence in the record that a lot of cars were obtained, and Rohrer Chevrolet sold a lot of cars, and one wonders, really, if there was any low volume on the part of these brokers, one really wonders whether that was the result of some action of General Motors or whether that was the result of some other problem.

So it would seem to me that we have to get into pretty specific evidence about what these people were doing and what orders and business they were drumming up as a result of whatever it was they were doing.

Where is the evidence going to be on that?

MR. PERSON: We are almost done compiling this, both from the cancellation standpoint in a broker-by-broker breakdown --

THE COURT: Who is going to get on the stand and tell what he was doing.

MR. PERSON: It's a compilation of the data we have in the files.

THE COURT: It's going to tell what the guy was doing?

MR. PERSON: No.

THE COURT: Was he a student? Was he --

MR. PERSON: We do have some acquaintance with many of the brokers.

THE COURT: What do you have about their potential, Mr. Person, realistically? How well did they do?

MR. PERSON: That it was a viable business, it could have been viable for the people in absence of the interference.

THE COURT: That is going round and round. What evidence was it that -- what kind of prospects did they get? General Motors was not there preventing them from going and calling on clients. There is no evidence of that. Now let's assume they went and called on clients.

What kind of orders, what volume of orders were they receiving?

MR. PERSON: We have as many as 300 unfulfilled, and I'm trying to -- and Mr. Kaplan has --

THE COURT: That doesn't answer my question.

MR. PERSON: We had about a thousand or fewer orders reflected throughout, including cancellations, and some brokers came in with no orders at all, and other brokers had numbers of orders, in the case of -- I can tell from the log that Schulta had, at page T30062 it shows he had come in with 83 orders by the date of August 28, 1968. Brokers vary from little or nothing up to a substantial amount of orders. And Turco himself had quite a few orders, in the hundreds. So it does vary from broker to broker.

THE COURT: Did Turco have a lot of orders in hand that he couldn't fill?

MR. PERSON: He had -- I can't -- other than as reflected in the Nabcor logs, I really can't at this second talk about Turco and rate of cancellation he had.

THE WITNESS: Could I have an example, your Honor?

THE COURT: Just a moment. Well, I think this is a prime subject for you to work on.

Now, another question, I want to know if you intend -- what additional witnesses do you intend to call after Mr. Maiorana? I don't want you to list them, but I would like to have you give us, at least by tomorrow morning, a list of the other proposed witnesses, an updated witness list.

Okay. Thanks a lot.

(Luncheon recess.)

rp1

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A F T E R N O O N   S E S S I O N

2.15 P.M.

FRANK MAIORANA, resumed

MR. KLEINBARD: If your Honor please, I would like to summarize where we were before we adjourned for lunch.

Mr. Maiorana was asked whether he had any idea how much money the area brokers were making at the time that --

THE COURT: I think the jury remembers. I don't think you have to summarize.

MR. KLEINBARD: We were talking about area brokers --

THE COURT: Please, the jury remembers. It wasn't that long ago. What is the next question?

CROSS EXAMINATION CONTINUED

BY MR. KLEINBARD:

Q Mr. Maiorana, I believe you testified with the exception of Mr. Turco and Mr. Strimple you have no idea as to the profitability of any of your master brokers, is that right?

A In that time period, yes.

THE COURT: Wait a minute, what is that time period? What other time period are you talking about?

THE WITNESS: I believe his question, your Honor, was between 1966 and 1968. We had master brokers after 1968,and that is a different question, your Honor, and a different subject.

THE COURT: What time period were you talking about?

MR. KLEINBARD: I was asking with respect to Mr. Strimple and Mr. Turco's entire business circumstances. That is to say, during the time they were functioning as Nabcor master distributors.

THE WITNESS: Your question, I believe --

THE COURT: Wait a minute, I don't think there is any particular utility -- I thought you thought he had excluded other master brokers as far as profitability. I assume that related to some time period.

MR. KLEINBARD: Let's take the witness's answer that he is talking about 1966 and 1969, your Honor.

THE WITNESS: I believe you said 1968, that was your question, up until 1968.

THE COURT: You are not thinking of the same thing.

Q I am saying at the time Defendants' Exhibit B-6 --

THE WITNESS: May we have the original question read back?

Q I am modifying my original question.

At the time that Defendants' Exhibit B-6 was distributed or prepared and distributed, with the exception of Turco and Strimple, you had no idea as to the profitability of any of your master brokers, isn't that right?

A B-6 does not apply to master brokers.

Q I understand that, but at the time that was prepared, the latter part of 1968, you had no idea as to the profitability of your master brokers, right, with the exception of Turco and Strimple?

A That is correct.

Q As to those, that is Turco and Strimple, you said that they made profits, but you don't know how much, isn't that correct?

A That's right.

Q I am reading from your examination before trial on April 5, 1973, page 1156:

"Q Do you know how many cars Strimple and Turco had sold at the time that Exhibit 43" -- which is the same as Defendants' Exhibit B-6 -- "was prepared?

"A No, I couldn't recall that.

"Q I am not asking you how many you sold. I am asking you whether when you prepared Exhibit 43 you knew or could determine how many cars Strimple and Turco had each sold?

"A No, I wouldn't have that information."

THE COURT: I am sorry to interrupt, but are you reading from a deposition?

MR. KLEINBARD: The deposition of Mr. Maiorana, which refers to B-6.

THE COURT: Can you all, when you read from depositions, translate the deposition exhibit numbers into the transcript numbers?

MR. KLEINBARD: Yes, your Honor.

THE COURT: Just read that question for my benefit because I was making notes. Start with the deposition reference one more, would you?

MR. KLEINBARD: All right.

"Q Do you know how many cars Strimple and Turco had sold at the time that Exhibit B-6 was prepared?

"A No, I couldn't recall that.

"Q Well, I am not asking you how many you sold, I am asking you whether when you prepared Exhibit B-6, could you determine how many cars Strimple and Turco had each sold?

"A No. I wouldn't have that information, because they were getting cars on their own.

"Q I see. And did you know how much money they were making or losing when you prepared Exhibit B-6?

"A I wouldn't have any idea.

"Q Do you have the information about the profit and loss or car sales for any of your other master brokers at the time B-6 was prepared?

"A No, I didn't have that information."

Q The ordinary brokers that you had, Mr. Maiorana, when you prepared B-6 in 1968, were not comparable in any way to the area brokers, isn't that true?

A I don't know the meaning of your question, it wasn't comparable. In any way?

Q Let me put it to you this way. The area brokers had the ability to sell to other brokers, they could sell franchises to other brokers, is that right?

A That is right.

Q And a broker could not do that, an ordinary broker?

A That's right.

Q All right. So in that sense they are not comparable, that is what I was driving at?

A I just wanted to clarify that.

Q I had asked you, Mr. Maiorana, whether in the sense that an area broker differed from an ordinary broker in the sense that the area broker could sell franchises to other brokers and an ordinary broker could not do that, correct?

A Yes, an area broker could establish 10 brokers and manage these 10 brokers, and that is where the system ended. It was not a pyramid system or anything.

Q You answered the question satisfactorily, Mr. Maiorana.

Now, in other words, you could not project an area broker's income on the basis of a broker's income, could you?

A Certainly, this is a projection based on what the manufacturers themselves used and very successfully, and that goes for Ford and Chrysler and in a lot of cases General Motors.

So that we took what was their marketing program and part of their marketing training and this is what this reflects and this is the projection and this is a system.

The only difference between theirs and ours is that the dealer was limited to one car that he could sell and our salesman had an advantage --

Q Mr. Maiorana --

A -- and a price advantage.

Q I merely asked you whether you could project what an area broker would earn on the basis of what a broker would earn.

A Certainly.

Q How could you do that?

A Based on projections if they did what it was possible for them to do, there is a market of 10 million automobiles out there, the market definitely exists, all brand name cars, and it did not require sales ability on the part of these people. They wanted the cars, our brokers had the advantage, a price advantage if they followed this program,. and if we had no interference they would have been able to meet these objectives and made these moneys, and the area brokers would have made their profit based on those projections.

Q Mr. Maiorana, you didn't base your profit projection for area brokers which is reflected in Defendants' B-6 on any records or statistical data, did you?

A I would like to have you explain that to me, Mr. Kleinbard. What do you mean by records or statistical data? This was an absolutely brand new system that had never existed before or since.

THE COURT: Are you telling me you don't know what records means and you don't know what statistical data means?

THE WITNESS: Not in conjunction with the Nabcor system that was completely new and different from any other system in the automobile distribution system, your Honor, and this had to be developed. We were developing a distribution system, and a distribution system which was designed to take a portionof the automobile market, which was ten million cars a year. Now, the leasing companies took 15 per cent of that market. Foreign cars took as much as 15 per cent.

THE COURT: Can't we have some questioning and some answers where we don't continually get summations to the jury?

THE WITNESS: I'm only explaining.

MR. KLEINBARD: I move to strike the witness' answer, your Honor.

THE COURT: Stricken.

Mr. Kleinbard, can't you just ask him what he based this on, and let's get through this? We have spent a lot of time on this.

MR. KLEINBARD: I would like to et establish, your Honor, and I asked the question and I don't think the witness has given me a responsive answer. I would like to read from a deposition that he has given.

THE COURT: All right.

MR. KLEINBARD: In an action called Mesirov against Nabcor, which was taken on July 28, 1971, and I'm reading from page 74.

MR. PERSON: Your Honor, I object, unless we can go into the Mesirov incident fully. In other words, I wish to have the full Mesirov incident brought out.

THE COURT: That objection is overruled. Whether he's technically entitled to read that deposition, I don't know, but we are not going into the Mesirov.

MR. KLEINBARD: I have no intention to.

MR. PERSON: I'm sure you don't.

MR. KLEINBARD: I'm reading it solely for the purpose of the witness' lack of statistical information with respect to these sales.

THE COURT: Do you claim a prior inconsistent statement to what he said here.

MR. KLEINBARD: Since he hasn't given me an answer, I'm reading what he said before on this subject.

MR. PERSON: I'd like to raise a further objection and just state that the origin of this action is suspicious and I'd like to be able to present it to the jury.

THE COURT: Oh, Mr. Person -- the objection is sustained.

MR. KLEINBARD: Beg your pardon, your Honor?

THE COURT: The objection is sustained. You can't read a deposition in another case, as far as I know, unless you read it as a prior inconsistent statement.

MR. KLEINBARD: May I have a yes or no, your Honor, to the question that I put to the witness. I will put it again.

Q Mr. Maiorana, did you base your profit projections for area brokers on any records or statistical analysis? Yes or no.

A Yes.

Q All right, you say yes?

A Yes.

MR. KLEINBARD: I would read, your Honor, from his deposition in Mesirov against Nabcor, at page 74, line 15:

"Q I am going to now read the specific documents called for and ask you to pull out those which are produced in response to these particular categories: The first category was,(and then quoting), all records, papers, books, charts, statistical analysis, diaries, correspondence, journals, invoices, and other writings used in whole or in part by Nabcor, Inc. in the preparation of the area distributor profit projection attached to the complaint,(and I'm translating, in accordance with your Honor's request), as Defendants' Exhibit B-6.

"I will show you B-6 and ask you which documents that you produced were used by Nabcor to produce that analysis.

"A There are no documents that we have that were used to produce these -- this particular analysis."

THE WITNESS: Your Honor, this is what I meant when I asked what he meant by statistical information.

THE COURT: Please.

MR. PERSON: I move to strike that question and answer because it is obviously not relevant. It isn't complete, that is, it doesn't impeach him whatever, or maybe the witness can answer why. In fact, I'd rather have the witness answer that question.

THE COURT: Well, the witness said in court here that he based B-6 on statistical data. He testified in the Mesirov deposition that he didn't use documents.

MR. PERSON: That he has, he said, that we have is what it said.

THE COURT: I didn't get that.

MR. PERSON: Read it again, please,

Mr. Kleinbard.

MR. KLEINBARD: Yes, I'd be glad to.

"Q I am going to now read the specific documents called for and ask you to pull out those which are produced in response to these particular categories. The first category was all records, papers, books, charts, statistical analysis, diaries, correspondence, journals, invoices, and other writings usin whole or in part by Nabcor, Inc. in the preparation of the area distributor profit projection attached to the complaint as Defendants' B-6.

"I will show you B-6 and ask you which documents that you produced were used by Nabcor to produce that analysis.

"A There are no documents that we have that were used to produce these -- this particular analysis."

THE COURT: The motion is denied. It's for the jury to determine whether there is any inconsistency.

Go ahead, Mr. Kleinbard, what's the next question.

MR. KLEINBARD: I don't know whether

the jurors still have F-6 or not. That was the statement filed with the SEC, the offering circular.

And on page 9 of that circular, the third full paragraph reads.

(Mr. Kleinbard read from Defendants' Exhibit F-6 in evidence.)

BY.MR. KLEINBARD:

Q Now, you testified at your direct, Mr. Maiorana, that the four automobile manufacturers had about 40,000 dealers in the country at the time the Nabcor system was introduced, true?

A I believe the figure was $42,000, Mr. Klein.

Q Forty-two. And therefore, unless you were to establish half as many sales locations in the domestic -- as all the domestic automobile manufacturers combined for your Nabcor system, there would have been area brokers and master brokers who would not have earned a refund of their initial investment.

A That is not precisely true. We put in a master broker and he's to put in 100 brokers or ten area brokers who would in turn put in ten brokers themselves, that is a hundred. That one would have received his full --

Q I didn't say there would be no one.

THE COURT: Mr. Kleinbard, you have got to ask questions. You make a statement and obviously he's going to come back and you are going to go back and argue with each other about different propositions. But that isn't what -- please do not do that.

MR. KLEINBARD: All right.

Q Mr. Maiorana, the question that I asked you was not whether each and every -- withdrawn.

The question I'm asking is not whether there would be any area brokers or master brokers who would recover their initial investment. What I'm saying is that unless you establish or I'm asking unless you establish half again as many, half the number of retail sales locations as all the domestic automobile manufacturers combined, there would be some master brokers and area brokers who would not recover their investment, isn't that true?

THE WITNESS: Read that back to me, Reporter.

THE COURT: Isn't it a matter of argument?

MR. KLEINBARD: I think it's a matter of arithmetic.

THE COURT: If it's a matter of arithmetic, it's a matter of arithmetic.

Q Now, Mr. Maiorana --

A Do I have a question ing here?

Q Beg your pardon?

A Is there a question?

THE COURT: No, there isn't.

BY MR. KLEINBARD:

Q All right, Mr. Maiorana, I show you what has been marked Defendants' WW for identification, which I believe you have seen before, and I ask you whether this is a book of materials that was not prepared by Nabcor to show to prospective franchisees.

A I don't know whether we prepared this or not. These are a lot of -- these are materials that we had within our business, and our marketing people did use and some of our master distributors did use. They may have added something to it or not. I don't know. I didn't look at every page of this to find out whether or not there are some materials that were ours and some that weren't.

THE COURT: The jury is not going to hear you. You've got to talk to the jury.

THE WITNESS: He handed me a document here.

THE COURT: Right, let's have the answer read by the reporter.

(Answer read.)

Q All right, Mr. Maiorana, is there any doubt in your mind that there is material in Defendants' WW that emanates from Nabcor?

A No, there is material that emanates from Nabcor there, yes.

Q And the only thing that you have reservations about is whether or not there has been some additional material added by a particular broker?

A Yes. And we didn't prepare this a particular document. This binder here, I don't recognize this as a binder that Nabcor would have prepared, the binder itself.

Q Do you recall giving it to Mr. Bolling?

A Do I recall giving this particular binder to Mr. Bolling?

Q This particular binder to Mr. Bolling.

A I don't recall that.

MR. KLEINBARD: Mr. Bolling, your Honor, of course, is a plaintiff in this action, General Auto Sales & Leasing, and I'd like to read from his deposition, Mr. Bolling's testimony at pages 855 to 856. I beg your pardon. At his deposition, page 113 to 114. I was giving your Honor the pages at the preliminary hearing.

"Q And Defendants' Exhibit WW itself was given to you, (meaning Bolling), after you became a distributor?

"A True.

"Q And it was to be used by you in selling broker franchises, true?

"A True.

"Q Now, sir, where did you get Defendants' Exhibit WW?

"A From Nabcor."

I offer the exhibit --

THE COURT: Any objection?

MR. PERSON: No objection, your Honor.

I just don't see that it has established anything. Certainly the documents, many of them are Nabcor's. I trust that it's for all purposes that we introduce it, so we may refer to those documents, too.

MR. KLEINBARD: I'm offering it as a document prepared by Nabcor and shown to Mr. Bolling in connection with the acquisition of his franchise, and for use by him to show to other franchisees.

THE COURT: That is the reason its offered, and for the moment, until some other valid use is shown, I will restrict it to that use, and I certainly am not at this moment receiving it for the truth of the matters stated therein.

(Defendants' Exhibit WW was received in evidence.)

BY MR. KLEINBARD:

Q I show you page 31 and page 32 of Defendants' WW.

MR. KLEINBARD: In view of the fact that it's admitted, your Honor. May I just read from it rather than questioning the witness. I think it would be quicker that way.

THE COURT: Sure.

MR. KLEINBARD: Page 31 and page 32 of Defendants' WW consist of a Dun & Bradstreet report. The Dun & Bradstreet report states that as of May 2, 1967, Nabcor had a net worth of $650,000.

BY MR. KLEINBARD:

Mr. Maiorana, it wa[illegible] true, was it, that a[illegible] May 2, 1967 Nabcor h[illegible] net worth of $650,[illegible]

I can't read this very well. Where do you see this?

Q In the middle of the page, right-hand side, net worth. Would you like to look at the original? I will show you the original.

THE COURT: I think we all can see that it says $650,000. Let's proceed. And $650,000 is followed by a plus sign.

THE COURT: All right, may I have an answer to my question, please. Will you repeat it back, Mr. Reporter.

(Question read.)

A As of May what?

Q May 2, 1967.

A Well, we didn't have $650,000, that

is for saure. As far as a net worth, I don't know where this figure came from or --

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THE COURT: Mr. Maiorana, the question was -- Mr. Kleinbard asked you -- I think we better let the reporter read the question back and you answer it directly.

(Question read.)

A Taking our concept into consideration, it would [illegible] a little figure. [illegible]ng from an accounting standpoint, no, we did not have [illegible] worth in dollars and ce[illegible]thout taking in possi[illegible] the value of the concept or brokers at that time which would have been a very low figure.

MR. KLEINBARD: I move to strike the whole part of the answer with the exception we did not have an accounting sense.

MR. PERSON: He is trying to explain what these figures represent.

THE COURT: I don't understand the answer, so if he is trying to explain it, I don't understand it.

You listen to the question and respond.

Q I will repeat it once again, Mr. Maiorana.

Let me give you the whole thing in order to answer the question. You should see the original which hopefully is clearer than this.

THE COURT: And let me see it, too.

MR. KLEINBARD: Surely, your Honor.

Q Would you want to take a look at the original, Mr. Maiorana, the same place of course.

Have you looked at it?

A Will you give me a minute?

Q It is one figure. I will give you all the time you want.

(Pause.)

Q Mr. Maiorana, are you reading the whole report? I just asked you to see if the net worth figure is $650,000.

A I am looking at the net worth thing.

Q Does it say $650,000?

A Yes.

Q Isn't it true that as of May 2, 1967, Nabcor did not have a net worth of $650,000 in any accounting sense?

A I don't know. There were accounts receivable here, notes which probably were franchise notes or to Nabcor, and I don't know the amount of those, what they were. We wrote off several hundred thousand dollars worth.

Q Does this have anything to do with what I asked you?

A Certainly, it is a receivable there, part of the assets.

Q All right, what is your answer, that you don't know?

A I don't know.

EXAMINATION

BY THE COURT:

Q What did the notes receivable consist of?

A Well, on this it looked like it said --

Q Notes receivable medium six figure. That is somewhere between --

A Two, three, four hundred thousand, something like that.

Q Did you have notes receivable of two, three or four hundred thousand dollars owed you?

A We wrote off over $250,000 in notes back then, your Honor.

Q Back when?

A Back in 1967. They were notes for franchises.

Q Notes of people who had agreed to pay for franchises?

A Had paid a certain portion and owed us certain moneys.

Q So that the notes receivable reference here was mainly notes from people who had agreed to pay for franchises, is that right?

A Right, and it may be cars that they owed us for.

Q You say you wrote off $250,000 of such notes?

A Yes, they were written off, your Honor.

Q When were they written off?

A When we made up our certified -- I believe that was in 1971, I guess. All those notes at the end of 1971.

Q You said that they were written off in 1967, but --

A They were still carried and then when we certified our statement we wrote off, our accountant wrote off all those old notes.

Q When did he write them off?

A When did he write them off?

Q Write.

A I think after we went public we certified -- we had unaudited statements prior to that, and I think the audited certified came after that. In 1972 we had our first certified statement and wrote all those off at that time.

Q $250,000?

A Approximately.

Q Five years after the May 2, 1967, date, right?

A Yes.

Q How many of those such notes did you have as of May, 1967, on your books?

A I would say the bulk of them, your Honor.

Q What?

A The bulk of those notes that we wrote off were at that time owed, the end of 1967.

Q Where they say cash low six figure, how much cash did you have?

A I really couldn't say, your Honor. We carried some pretty sizable accounts. The First National Bank we were carrying 25, 30, 40 thousand dollars.

Q Low six figure, that would be one hundred thousand or more?

A But we had banks in Philadelphia and --

Q How much were you carrying in early 1967?

A It says we were in low six figures at the time that this report came out. Probably we may have had in the low six figures. We were selling automobiles and there was cash coming in and there may have been an amount of cash in the bank from franchise agreements coming in.

I didn't give this information, your Honor, and I didn't --

Q The basic question was, Mr. Kleinbard asked you was it right or wrong. You are saying it wasn't right?

A I am saying it is possible we had that much money at that time.

Q I am not interested in possibilities. The question was right or wrong.

A To be precise, I cannot give you a precise answer because I don't know, your Honor.

Q You don't know whether it is right or wrong?

A No, I don't.

BY MR. KLEINBARD:

Q Mr. Maiorana, the interrogatories which Nabcor interposed in this very action indicate that Nabcor had a negative net worth on that date to the extent of $143,648.78.

MR. PERSON: At what date?

MR. KLEINBARD: May 2, 1967.

MR.PERSON: What was the date of the financials?

MR. KLEINBARD: The answer was May and said May 2, 1967. Taken from the interrogatories as of May 2, 1967.

THE COURT: Could you just give me the figure before you go any further?

MR. KLEINBARD: Negative net worth is $143,646.70.

Q The next preceding fiscal period, as of January 31, 1967, showed --

THE COURT: The next preceding?

MR. KLEINBARD: The next preceding figure is a negative net worth of $143,764.63.

There were some questions, your Honor, asked with respect to the amount of cash. The interrogatory answers indicate that as of May 2, 1967, the amount of cash owned by Nabcor was $7,201.96, and as of the close of the period next preceding May 2, 1967, or in other words, January 31, 1967, the amount of cash that Nabcor had was $16,995.57.

2 There were some questions about notes. As of May 2, 1967, notes receivable, the interrogatories give no figure.

But as of January 31, 1967, the amount of notes are $87,545.88.

THE COURT: I don't think the jury can properly understand the relation of all these figures. But in this Dun & Bradstreet report it has a figure for net worth and I don't think there will be any controversy that net worth equals the assets, roughly speaking, minus liabilities and the total liabilities here listed were $12,000. So the total assets in order to produce a net worth of $650,000, the total assets would have to be $670,000.

Now, there are two specific items listed, fixtures and equipment, $25,000. Improvements, $36,000, total of sixty-one.

So the rest of the assets would have to be a little over $600,000 and the items listed were cash and notes receivable, which would mean that in order to create a net worth of $650,000 as of May 2, 1967, the cash and notes receivable would have had to equal the value of about $600,000.

So the evidence about the cash and the notes, that is the context it is in.

Q You said, I believe, that you didn't know who gave this information to Dun & Bradstreet, Mr. Maiorana.

Doesn't it recite on its face the information came from your brother Anthony?

THE COURT: Yes, it does recite that. Next question.

Q Now, if you go a little bit further, right under the line that represents the net worth, the Dun & Bradstreet refers to anticipated sales of $13,000,000.

Have you any idea what the total gross income was of Nabcor in the preceding fiscal year which ended on January 31, 1967?

A What was that question again, Mr. Kleinbard?

(Question read.)

THE COURT: What was the sales the preceding fiscal year?

THE WITNESS: Sales of automobiles?

THE COURT: Total, whatever.

THE WITNESS: I don't know what that figure would be.

Q You have no idea?

THE COURT: You have the figure there, let's not waste any more time.

Q I would like to show you Defendants' Exhibit LLL and I would like to offer that.

THE COURT: What is that?

MR. KLEINBARD: It is the financial statement for Nabcor, Inc. prepared by Isadore Gittler, Certified Public Accountant, for the period ending the fiscal year January 31, 1967.

THE COURT: Any objection?

MR. PERSON: May I see it, please?

No objection.

THE COURT: Received.

x (Defendants' Exhibit LLL received in evidence.)

Q The question was what the total gross --

THE COURT: Well, it shows it.

MR. KLEINBARD: It shows it and I will read the figure that the total gross revenue, taken in by Nabcor, equalled 275,147.

THE COURT: Ladies and gentlemen of the jury, as long as its been given to you, look at the last page, up at the top where it says total income -- let's give the jury a minute to look at it --

MR. KLEINBARD: Surely.

(Pause.)

THE COURT: Okay. Go ahead.

MR. KLEINBARD: Continuing with this D&B which is contained in Defendants' WW, a document passed out to various franchisees, there is the comment that on May 2, 1967 -- it's about the lower, just a little bit below the middle of the page, the lower part -- Anthony Maiorana, secretary-treasurer, stated that sales at the current rate of travel will return profits of at least a low to moderate six figures.

Now, in Defendants' LLL, which you all have in front of you, you will see that for the preceding fiscal year ending on January 31, 1967, Nabcor showed a gross profit of only $20,474.

Q Now, Mr. Maiorana, you testified here on direct that in December of 1966 Midtown Chevrolet cut off your source of supply of cars, true?

A Right.

Q And you have told the jury that in March of 1967 Ruckle Pontiac cut off your supply of cars, true?

A That's right.

Q And that in early 1967 Luby Chevrolet cut you off also?

A Yes.

Q And yet after May of 1967 you were still passing out, in Defendants' WW, D&B reports predicting that your estimated sales for the year would be 13 million as compared with the $275,000 that you had in the preceding fiscal year, true?

THE COURT: Mr. Kleinbard, I just can't have -- are you making statements, arguments; are you summing up or what are you doing?

MR. KLEINBARD: I asked him if that is correct.

THE COURT: You can wait until summation for that.

MR. KLEINBARD: All right, your Honor.

THE COURT: It's all in evidence.

MR. KLEINBARD: Just give me a moment, your Honor. I have to get some other documents.

(Pause.)

BY MR. KLEINBARD:

Q When we adjourned some days ago with respect to your cross I was questioning you about your most recent account of your first meeting with Mr. Belcher, trying to get your mind back to that, and in particular your testimony which followed your lawyer's question, and the question was at 444 of the transcript, line 19:

"In your discussion with Mr. Belcher did you ever have any discussion about Rohrer Chevrolet?"

And then you answered, and I quote, that "They" -- referring to the Buffalo zone -- "traced the serial numbers from the Buffalo zone to the Philadelphia zone. We had delivered, I believe it was, two or three cars to the Buffalo area, and delivered them to our distributor there who delivered them to his customers, and they traced the serial numbers back to Rohrer Chevrolet and stopped them, and Philadelphia zone stopped them from selling us any more cars.

"Q Stopped who?

"A Rohrer Chevrolet.

"Q This is what you told Mr. Belcher?

"A Yes."

Now, your Buffalo distributor I believe you have testified was General Auto Sales & Leasing, a plaintiff in this action, correct?

A Yes.

MR. KLEINBARD: The Plaintiffs' Exhibit 450 --

THE COURT: Incidentally, what was the reference you just were reading from, Mr. Kleinbard, please?

MR. KLEINBARD: The part of the transcript, the trial transcript?

THE COURT: Yes.

MR. KLEINBARD: I think it was page 444, at line 19, and ending at line 21.

Plaintiffs' Exhibit 450 shows that R Rohrer delivered a Chevrolet to General Auto Sales --

I'm sorry -- to Nabcor, for General Auto Sales, on 12/12/67. That is already in evidence.

THE COURT: What's the date?

MR. KLEINBARD: 12/12/67.

THE COURT: Okay.

MR. KLEINBARD: Adn that is the first car that was delivered to General Auto Sales from Rohrer.

Q Rohrer Cehvrolet is located, is it not, in Camden, New Jersey?

A Yes.

Q And this car that we are talking about for General Auto Sales was driven to Buffalo from New Jersey, was it not?

A It may have been. I don't recall.

Q I just read you the testimony, Mr. Maiorana.

A If that is what it says, I believe they were driven up there, yes. There were three, I believe, that were driven up. One was turned back.

Q This particular one that was driven -- is it your testimony that between December 12th, when Nabcor obtained the car from Rohrer, and

and December 14th, when you met Mr. Belcher, the following events took place:

One, the car was driven from New Jersey to Buffalo?

The answer to that is yes, correct?

MR. PERSON: Your Honor, I object, because he mentioned there were two other cars. Why doesn't he get those in and then ask the question?

MR. KLEINBARD: I'm taking the first car. I don't have to do three cars at once.

THE COURT: Is this the first car -- delivered to Nabcor of those three or whatever it is?

MR. PERSON: No.

THE COURT: No?

MR. PERSON: No.

THE COURT: When is the first car -- there is no use in this questioning then.

MR. PERSON: The first one, your Honor, was on 11/16/67.

THE COURT: Look, we have got this exhibit, which everybody has got, D-7. Where does it appear on D-7?

MR. PERSON: Your Honor, the Nabcor police book shows that deal number --

THE COURT: What's the serial number of the car? Let's have the two or three cars you are talking about.

MR. PERSON: The three cars, the last six digits are 33639, 39241 --

THE COURT: Has the jury got this D-7?

THE JURORS: No, it was given back.

THE COURT: Have you got extra copies of D-7, please?

(Pause.)

THE COURT: All right. Now, you recall there has been testimony about an allegation that three cars were -- two or three cars were bought from Rohrer in Camden for delivery to Buffalo for this broker, General Auto Sales.

Now, are there two?

MR. PERSON: There were three.They were to Buffalo. One was two two franchisees of General and the other one was to General. The three serial numbers are 33639 --

THE COURT: Okay, look at the second

page, next to the top. Put a little check if you want to, if you have pencils. What's the other?

MR. PERSON: 39241.

THE COURT: Where is that, page 1?

MR. PERSON: That was Pemberton, that was a car that was rebought by Rohrer. That was up there and rebought.

THE COURT: Just a second. Let's just have the cars.

What else?

MR. PERSON: 42742.

THE COURT: 42742. That's up in the middle of the first page. Okay, has everybody got that?

The second one is third from the bottom, first page.

So you've got the three cars which are five from the bottom on the first page, third from the bottom, first page, and then the second one, on the second page, from the top.

Okay, where do we go from here?

MR. KLEINBARD: Your Honor, what I'm saying is that the car 33639 --

THE COURT: That is on the second page.

MR. KLEINBART: That's right, is the first car delivered to General Auto Sales and it is so indicated in Plaintiff's 450. And it was delivered on December 12, 1967.

THE COURT: Is that correct, Mr. Person; can that be stipulated from 450?

MR. PERSON: It is the third one to Buffalo and the first one to General.

MR. KLEINBARD: I beg your pardon?

MR. PERSON: We are talking about Buffalo.

THE COURT: What did they do when they got to Buffalo, park it on the street or what?

MR. PERSON: Auto Livery got the 39241, which was repurchased, that came back from Buffalo, and the other car, 42742, was delivered to Owens, American Auto Brokers.

THE COURT: Owens?

MR. PERSON: A franchisee in the Buffalo area.

MR. KLEIN: I'm not asking about those

other two, your Honor. My question was limited and I don't think there's been any different brought out by all this discussion that the car 33639, which appears on page 2 of D-7, is the first car delivered in the Buffalo area to General Auto Sales & Leasing and was delivered on December 12, 1967.

THE WITNESS: It's not true, your Honor. Owens was a franchisee of General Auto Sales & Leasing.

THE COURT: Is there an objection to this question?

MR. PERSON: An objection on the grounds that it is not --

THE COURT: Sustained.

Q When was the first car delivered in Buffalo to General Auto Sales & Leasing, Mr. Maiorana, when is it your contention?

A It was delivered to General Auto Sales & Leasing's broker in November, some time in November.

Q And you base that on what? Can you show me where? Can you point to any record where it shows the first car purchased by General Auto

Sales & Leasing was delivered to it in November?

A I don't have the records in front of me.

MR. PERSON: Your Honor, from the records themselves that I have examined, the question is, once again, whether Mr. Maiorana is referring to Buffalo generally or to Mr. Dale Strimple specifically, and I think it shows that he's talking about the Buffalo area, otherwise the first car --

THE COURT: It's a good time for recess. We'll try to get this straightened out.

(The jury left the courtroom.)

THE COURT: If I can get the drift of the problem, Mr. Kleinbard, it's this, that if you are trying to show all the things that would have had to happen before the talk with Belcher on December 14th, then your proposal to start with the first car, of course, was a way to approach it. They are simply saying that the first car for the sake of that problem isn't necessarily the car you are talking about, because they are talking about a problem about two or three cars to the Buffalo area, which precipitated this, and if there was indeed a car delivered back in November to some other broker of Nabcor, well, that would be part of this problem.

MR. KLEINBARD: Your Honor, I read first Mr. Maiorana's testimony that we had delivered, I believe, two or three cars to the Buffalo area, and delivered them to our distributor.

Now, I then asked him whether the distributor wasn't General Auto Sales & Leasing, and he said yes. And there were only three cars involved in Buffalo, two of them went elsewhere, and one, it's uncontested, went to General Auto Sales & Leasing.

THE COURT: I think you are putting an unrealistic --

THE WITNESS: Your Honor, General Auto Sales & Leasing became a master broker of Nabcor in October of 1967. Owens, who was in his territory, became a broker --

THE COURT: Look, Mr. Person, the first of these three cars went to Buffalo when, and where did it go?

MR. PERSON: It went to North Tonawanda, which is near Buffalo; Mr. Czochara was the customer, and it went to Mr. Owens, a broker of Strimple, and it was delivered, purchased by Nabcor from Rohrer on November 20, 1967.

THE COURT: When was it delivered up in Buffalo.

MR. PERSON: Same day; it was driven up immediately, within no more than a day apart.

THE COURT: So you are saying that the first transactions went to the customer of the Owens broker.

MR. PERSON: Correct, your Honor.

THE COURT: And that was November 20th?

MR. PERSON: Correct.

THE COURT: What was the second of the transactions?

MR. PERSON: The second was Pemberton; that went to Auto Livery and was rebought because of the customer's refusal to buy the car. And it went back to Rohrer Chevrolet.

THE COURT: When did that go to Pemberton?

MR. PERSON: 11/16 is the date. That was the first automobile.

THE COURT: Did it get up to Buffalo?

MR. PERSON: It did get up there and came right back. I don't know exactly how long, but I'm sure it wasn't very long.

THE COURT: That was 11 --

MR. PERSON: 16.

THE COURT: That was really the first.

MR. PERSON: That was the first.

THE COURT: I think you have got to start with those earlier ones, Mr. Kleinbard. Then if you have to drop it, drop it.

MR. KLEINBARD: Right.

(Recess.)

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(Jury not present.)

MR. KAPLAN: Mr. Person just advised me that he subpoenaed six more dealers to testify here tomorrow.

MR. PERSON: Four.

MR. KAPLAN: Four dealerships and six witnesses.

MR. PERSON: Not tomorrow. I served notice on Colonial Cadillac, that is Robert Murray, as indicated in the pretrial order. Also with Marty Motors, a dealer that I named earlier, and a companion dealership Bano Buick, and the last one was Moe Cerota Chevrolet.

Mr. Kaplan has taken violent objection and I wasn't aware that I did anything that was --

THE COURT: The reason I asked you about your witness list, and I wasn't expecting to get into this this afternoon, but when are they subpoenaed for?

MR. PERSON: Marty Motors for tomorrow at 10 and Colonial --

THE COURT: That relates to what?

MR. PERSON: That is a dealer up in Mount Kisco, and they were selling Cadillacs and Oldsmobiles to Nabcor and hiding the titles with the Cadillacs from General Motors and selling Oldsmobile outright and not hiding the titles.

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Then also there is a companion dealership Bano Buick.

THE COURT: Have you ever talked to them?

MR. PERSON: No, I haven't, your Honor.

THE COURT: How do you know what happened?

MR. PERSON: Well, I am relying on my client and I never had any indication, contrary to what you may believe, but I understand what happened. I put it in the pretrial brief, and I just want to confirm or not as the case may be. They are fully aware of what our contentions are.

THE COURT: Is there anything more to be presented on Colonial Cadillac than was brought out on the preliminary injunction?

MR. PERSON: We weren't allowed to go into Colonial, except the very last transaction. There were 44 deals, Cadillac orders, over a course of many months, all of which they refused to deliver.

MR.KAPLAN: Your Honor, if I may be heard at this time? This is not the first time this problem has arisen.

We had to prepare this case for trial on a number of premises and one of them was the witness list.

THE COURT: I would suggest this, I will talk to you after the session. Let's bring the jury in, as they have been sitting there for a while.

(Jury present.)

BY MR. KLEINBARD:

Q Mr. Maiorana, I neglected to ask you two or three questions before proceeding on.

I am showing you Defendants' Exhibit C-7, which is an area distributor agreement between Nabcor and a Mr. Sipa. All I want to ask you is that a typical area broker form contract?

A Your question is what, Mr. Kleinbard?

THE COURT: Is that a typical area distributor agreement form?

THE WITNESS: This is an area distributor agreement form for master distributors.

When we appointed a master distributor, this was the form that we supplied to him so that he could appoint his own area distributors, your Honor.

Q In that sense it is a typical form?

A One of our forms.

Q One of your forms?

A Yes.

Q It istypical of other forms of its type, correct?

THE COURT: I think he already said that.

Do you want to offer it in evidence?

MR. KLEINBARD: I do want to offer it in evidence.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: Received.

(Defendants' Exhibit C-7 for identification received in evidence.)

Q You have previously testified about the agreement between Nabcor and Messrs. Bolling and Strimple and Kuhaneck, Defendants' Exhibit Y.

Is that a typical area master distributorship agreement of that period for Nabcor?

THE COURT: What is the number?

MR. KLEINBARD: That is in evidence, your Honor.

THE COURT: I don't think you need to take this long. We used Exhibit Y. Is this a form?

THE WITNESS: There are different forms that we used as we continued to perfect the system, just like automobiles, people make model changes, and we try to eliminate errors and things like that.

This was a form that was used with some

corrections for the master distributorship that we created in the Buffalo area of the two prior agreements.

The one that was Dale Strimple and one with Multi-Make, which was Don Bolling, we combined the two at their suggestion into a master distributor in the Buffalo area and turned over to them the two other brokers in the area as their brokers for them to then establish a distributorship.

MR. KLEINBARD: I move to strike the witness's answer, your Honor. It is totally unresponsive to my question.

THE COURT: Let's go on.

MR. KLEINBARD: I do need this answer.

THE COURT: He said he kept improving the forms just the way you improve cars.

MR. KLEINBARD: I understand, but I want to know whether at this point in time were you using Defendants' Exhibit Y as a form for master distributor contracts, franchises.

A I used it in this particular instance.

Q This particular instance only, is that what you are telling me?

A I don't know. I believe I changed it.

Q Is it your testimony that you sed this in this case only?

A No.

Q There were other brokers that you sold on the basis of this form?

A I don't know. The first master distributor we --

Q Can you answer yes or no whether you did or didn't?

A I am trying to determine that.

Q Determine it in your own mind, we don't have to hear you think. I just want an answer yes or no. You can do that to yourself.

A Yes or no to what, Mr. Kleinbard?

Q Did you use this form to sell other master distributorships to any other master broker; yes or no?

A I would have to see the documents of other master distributorships to determine that.

This was the second master distributorship we established. I don't know whether I used that form again.

I believe that we made improvements in the master distributorship in the --

Q This is unique?

A This particular form actually says that it is an area distributor agreement, so I may have changed this form almost immediately because we just created the master distributorship program and there are other writings on this, so to answer the question precisely I cannot, Mr. Kleinbard.

Q Well, I think you have answered it precisely, Mr. Maiorana.

Now, in the same fashion, Mr. Maiorana, you used a word when I was cross-examining you earlier, or used the expression, to the effect that NAB Corp. wasn't a pyramid system.

Can you tell me what you mean by a pyramid system?

A First of all, I'd like to know what you mean by pyramid system.

Q That is the next case, Mr. Maiorana. Just tell me what you meant by it, what you mean by it.

THE COURT: The point is, you used the word. What did you mean by it?

THE WITNESS: I, your Honor?

THE COURT: Yes.

THE WITNESS: Okay.

There was a Glen Turner Dare to Be Great system where they went and they appointed a person who was adistributor then --

THE COURT: I am not going to pursue this.

THE WITNESS: I have to explain it, because it goes on ad infinitum. You run out of people in the

United States. Our system was not that type of system.

Q Just explain to me what you mean by a pyramid system, that is all I'm asking.

THE COURT: Can you explain in the abstract without getting into Glen Turner specifically?

THE WITNESS: I'm sorry, your Honor, for referring to that.

A pyramid system allows the distributors to appoint other distributors beneath them, and then they in turn appoint some more people under them, and then they in turn appoint others under them, and it goes on ad infinitum, there isn't enough people in the world.

Now, our system stopped --

Q I understand what you meant by pyramid system.

A We just had a three-tier system. The manufacturers had the same thing, they had distributors, and they had dealers, until 1965.

Q Mr. Maiorana, stop the needle. You have answered my question.

A I'm giving you comparisons, Mr. Kleinbard.

Q Getting back to Mr. Belcher, you testified that Mr. Belcher said he knew about NAB Corp.'s alleged problems in Buffalo; is that right?

THE COURT: Where are you reading?

MR. KLEINBARD: I'm sorry, the transcript at 447, your Honor. I'm sorry, 435. Beg your pardon.

THE WITNESS: Your question was?

Q That you testified on your direct that Mr. Belcher said he knew about NAB Corp.'s alleged problems in Buffalo.

A I don't believe I said that. I can say what I did say.

THE COURT: Why don't you just read it, Mr. Kleinbard?

MR. KLEINBARD: Yes.

Mr. Maiorana, your Honor, on his direct, starts at page 433, with the meeting with Mr. Belcher, and then describes at page 434 some of the problems in Buffalo and the Buffalo area, and then at the top of page 435 "he (referring to Mr. Belcher) looked it over, and this is the Buffalo Automobile Dealers Association Bulletin.

And he said, 'Look', he said, 'Mr. Maiorana, I am aware that these things happen.'"

Q Now, did you give that testimony?

A Yes, but that is not what you had said before, Mr. Kleinbard, and I want to make sure that we don't go into misleading statements here.

Q The jury has heard that.

THE COURT: The jury has heard exactly what Mr. Maiorana has said.

What is your question, Mr. Kleinbard?

Q In fact, Mr. Maiorana, Mr. Belcher said no such thing, isn't that true?

A No, that's not true.

Q You were deposed on March 15, 1973, and at that time you testified that you told Mr. Belcher about NABCOR's alleged problems, and I will read you your reply at page 441 of the transcript -- 411, I'm sorry:

"Then he said to me, 'Mr. Maiorana', he said, 'do you realize that we don't know anything about this? This is the corporation, and the automobile division is separate.'"

Now, Mr. Maiorana, on or about 12 --

A Just a second. You just made a statement. Are you going to ask me a question about that, because I deny what you just said there, that that is my entire testimony at that time.

Q All right.

A And you are again misleading.

MR. KLEINBARD: Your Honor, I can't continue with this witness if I can't ask him question.

THE COURT: I must say, Mr. Kleinbard, I don't see the contradiction, and I think we are having a little confusion. I know it is up to the jury but let's not argue about that.

MR. KLEINBARD: Your Honor, I don't want to rehash it. The jury has heard it.

THE COURT: The jury has heard it. Let's go on.

MR. KLEINBARD: All right.

Q On or about December 14th you telephoned the General Motors Building and asked to speak to Mr. Roche personally, correct?

A I believe you are using December 14th, and I believe I used December 15th, Mr. Kleinbard. Let's stick with what I said.

THE COURT: What is the question, Mr. Kleinbard?

MR. KLEINBARD: Could you repeat it,

please?

(Record read)

THE COURT: He said on or about. You did call?

THE WITNESS: Yes, I did.

THE COURT: Next question.

Q And the call was taken by Staff Assistant Edward Belcher who said that he could speak for Mr. Roche?

A It was taken by, I believe my testimony was that it was a female.

Q I'm just asking whether you ultimately got to Mr. Belcher.

A I ultimately got to Mr. Belcher, yes, and I --

Q And he said he could speak for Mr. Roche, correct?

A Yes, after leaving -- I insisted on speaking to Mr. Roche, that it was a serious problem.

Q Please, Mr. Maiorana, did you speak to Mr. Belcher and did he say that he could speak for Mr. Roche, yes or no?

A Yes, he left the phone for a minute, came back, said that Mr. Roche was very busy, but he had given him authority to speak on his behalf, and I said, fine, then I will speak to you, since you have the authority.

Q All right.

And of course you don't know of your own knowledge whether he spoke to Mr. Roche or not, do you?

A I only know that he left the phone for a moment and came back and told me that he had spoke to Mr. Roche.

Q You were asked about this when you testified on March 15th, as to whether or not --

A Of what year, Mr. Kleinbard?

Q 1973.

A I see.

Q As to whether Mr. Belcher left the phone and told you he had spoke to Mr. Roche, and were you asked this question at that time and you said: "At this point I just don't recall. I vaguely recall something to that effect."

A What was that, Mr. Kleinbard?

Q I've read it, Mr. Maiorana.

THE WITNESS: Read it back to me, Mr. Reporter.

THE COURT: What was the question to which that was a response?

MR. KLEINBARD: "Question: Did he tell you that he had spoken to Mr. Roche?

"A At this point I just don't recall. I vaguely recall something to that effect."

That is at page 404.

THE COURT: All right. Next question.

Q Now you arranged to meet Mr. Belcher immediately, correct?

A Yes.

Q And you claim that you went there to complain to him about certain problems confronting NABCOR, correct?

A Yes.

Q Wasn't the real purpose of your visit to extort a fleet certificate under threat of litigation?

A Absolutely not.

Q You went to Mr. Belcher with the knowledge that NABCOR did not qualify for a fleet certificate, didn't you?

A I didn't go up to see Mr. Belcher with any idea in mind of applying for a fleet certificate. I called the chairman of the board of General

Motors and I think my testimony, and you can read it, you have deposed me four times already, and the same thing comes out, that there was a problem involved here with General Motors personnel telling dealers not to sell cars or threatening dealers with cancellation if they sold cars to NABCOR franchisees, NABCOR brokers.

That was the problem that I was bringing to Mr. Belcher's attention, before I went to the Justice Department, which eventually came in and investigated it.

MR. KLEINBARD: I move to strike that, your Honor.

THE COURT: Denied. You opened it up. You asked about his purpose. If you want to hear his purpose, you will get his purpose.

Q All right, Mr. Maiorana, as long as you have brought up that subject, you have, during the course of this situation, complained to a number of United States Senators, have you not, about NABCOR's problems with GM?

A Yes.

Q And you have also complained to a

number of attorneys in the Department of Justice, the Antitrust Division of the Department of Justice?

A I complained -- let's take the first question -- to Senator Wayne Morse's associate general counsel, and it was after the meeting with Mr. Belcher that --

Q Does he have a name?

A Yes, Ray Watts.

Q Ray Watts.

A And it was after that --

Q All right, I'm asking for the names of the senators that you complained to, if you want to go back to that.

A I can go into various --

Q I'm just asking for the names.

Did you complain to any other senators or senate personnel other than Senator Morse's assistant staff director, Raymond Watts?

A Oh, yes, Senator Philip Hart.

Q Senator Hart.

A Senator Hart.

Q What about Gaylord Nelson?

A Gaylord Nelson took over from Wayne Morse after he was voted out of office as a senator, and Gaylord Nelson took over that particular committee which was the Select Committee on Small Business, I think that is --

Q You complained about your problems with NABCOR to him as well, right?

A What time period are you talking about, Mr. Kleinbard?

Q From 1968 to August of 1973.

A 1968?

Q I say from -- I'm covering the period from 1968 to August of 1973.

A No.

Q It doesn't mean it happened every day of each of those years.

A If you want to talk about 1968, we had communication with Senator Wayne Morse, and he sent Ray Watts with me to the United States Justice Department with instructions to look into the matter of NABCOR and General Motors activities against NABCOR and introduced -- I was introduced to, then, Robert Weinbaum, who was the attorney in the California case, which was then hired by General Motors, I might add, who was the first federal attorney that started to investigate the

NABCOR case and showed me the documents of the California case, where Mr. Roche was involved, and all of these, and they wanted to go into a criminal action against General Motors.

Q All right, now --

A And that was the first.

Q That is the first one, and you saw him early in 1968, is that correct?

A After the --

Q Can't you just say when you saw him? Do you agree with me or not?

A Yes, I'm trying to. After all of my efforts to get General Motors to correct the situation --

Q I don't want all your efforts.

Did you see him early in 1968?

A Yes, after --

Q I don't want after. I want, did you see him early in '68 and your answer is yes?

A Yes.

Q And then did you also see an attorney by the name of Wittinghill?

A Wittinghill assigned Robert Weinbaum to the case.

Q Did you see him?

A Yes.

Q Did you see somebody by the name of Cooman?

A Cooman?

Q Yes.

A Much later. Not at that time.

Q I understand. Later. And then you saw, communicated with an attorney in the Antitrust Division by the name of Leinsdorf?

A You are out of sequence, Mr. Kleinbard. I'd like --

Q I'm concerned about the number of people that you have complained to in the Department of Justice.

A I did not make a complaint to Mr. Cooman. Robert Weinbaum and the Justice Department in Washington referred it to the Justice Department here in New York for action.

Mr. Leinsdorf was the federal attorney who was assigned to the case, and to do an investigation which he did do, and recommend the convening of a grand jury as a result of that investigation.

Q Did you have communications with Mr.

Leinsdorf? I didn't hear an answer yes or no.

A Yes.

Q You said earlier that you don't recall communicating with Mr. Cooman.

A Cooman came after.

Q Cooman.

A I did not say that I didn't communicate with him. I said you were out of sequence. Mr. Leinsdorf --

Q I'm asking did you communicate with him.

Q I'm asking did you communicate with him.

A Yes, after Mr. Leinsdorf left the department, Mr. Cooman took over.

Q Did you communicate with Edward Friedman?

A Yes.

Q Did you communicate with Assistant Attorney General Bruce Wilson?

A Yes.

Q None of these complaints have resulted in an indictment or conviction of General Motors on any charges relating to NABCOR, isn't that right?

A They were --

Q Yes or no, Mr. Maiorana? Has it resulted in an indictment or a conviction, yes or no?

A On a criminal basis?

Q That is right.

A No, on a criminal basis, no, and this is what they were pursuing.

Q No is no.

A No is not correct. No is not correct. They proceeded --

THE COURT: Look, I have really sat through this, it is all very interesting, and it is lively, but it is getting out of hand.

THE WITNESS: Your Honor, he is trying to mislead the jury into believing that nothing came of this.

THE COURT: If you will just let me finish this. I do not regard it as particularly relative that you have injected into this case at various points the idea of complaints to the Justice Department and I think the term grand jury was mentioned.

Now, I think it is a matter of record, and I do not think we have to argue that there was no indictment returned against General Motors in respect to his matter, and of course, since there was no indictment, there was no conviction. That I think is a fact, and that will be that, and we will proceed to something more germane.

I would say to the ladies and gentlemen of the jury that, the fact that the Department of Justice did not see fit to return an indictment, is something that you should know to clear up any misapprehension or any -- if you wondered, but it in no way, it is not to be considered by you as evidence in favor of General Motors in this case, as evidence indicating a lack of wrongdoing and so forth because the evidence, this case is to be tried on evidence in this courtroom, not on the basis of something that may have gone on between Mr. Maiorana and Ray Watts or Mr. Maiorana and one of the many attorneys of the Justice Department or things in a grand jury and so forth.

MR. ERSON: Your Honor, it may be helpful that Mr. Maiorana was not called to testify, so that these issues that he is presented were not presented.

THE COURT: I am not going to get into that. The jury is not to infer anything from the fact that there was no indictment except if it clears up some possible confusion.

Now let's go on to something else. I do not want to hear anything more.

THE WITNESS: Your Honor --

THE COURT: I want to hear absolute minimum about all this extraneous material about your complaints to this one and that one.

The case is to be tried in this court and that is that. Let's go to something more germane.

Q Getting to your conversation with Mr. Belcher, where we were before we were sidetracked, you told Mr. Belcher that Strimple threatened that he was about to go to the Justice Department, right?

A Yes, Dale Strimple had --

THE COURT: I just cannot have this. Every single question is the occasion for a repetition of what you want to present. Your job is to answer questions. It is not to continually argue your case, and I will take steps to prevent this if I have to.

Now you listen to the question. I sat

here through about a few minutes trying to be very patient.

I have to have a record. You answer the questions and do nothing beyond it.

What is your question?

THE WITNESS: Fine, your Honor.

MR. KLEINBARD: I'm sorry, is there an unanswered question?

THE COURT: You ask the question.

Q I believe I asked whether you told Mr. Belcher that Mr. Strimple threatened that he was about to go to the Justice Department.

A Yes.

Q And you reminded him of an earlier Antitrust case in which General Motors was involved out in Los Angeles?

A I believe I did, yes. He was aware of it.

Q When you saw Mr. Belcher you told him not only about Strimple's threatened complaints, but that you had discussed the situation with your own attorney, is that right?

A To be precise, no.

Q Well if we are going to be precise,

let's look at the transcript.

Reading from your direct testimony, Mr. Maiorana, page 440:

So I told him that my position was that I didn't want to go into this, I didn't want to go into litigation. All I wanted to do was to be in business. I had a viable system, a legal system, and that it was being interfered with, and I called my attorney, and I asked him would it be wise to bring this to the attention of the head, right at the top of the corporation, just in case they did not know that this was going on. And to advise them of this before I went to the Justice Department or before I allowed Dale Strimple to go to the Justice Department.

"Q Did you say this to Mr. Strimple?

"A Yes, I did."

A Yes, that is true. That is not what you said before, though.

MR. KLEINBARD: Move to strike that, your Honor.

MR. PERSON: It happens to be correct. It is an observation --

THE COURT: Let's proceed. Let's go

on.

Q You also said to Mr. Belcher that it was imperative that we act immediately.

A Yes; I said it was imperative. Time was of the essence.

Q And you claim that Mr. Belcher asked you at this meeting that if you thought that getting any fleet certificate for NABCOR would help.

A I didn't tell Mr. Belcher that getting a fleet certificate --

Q I didn't ask you that, I said that you claimed that Mr. Belcher asked you at this meeting if you thought that getting a fleet certificate for NABCOR would help.

A That in substance was what Mr. Belcher said and suggested by way of attempting to solve the problem. I wanted a letter sent to all of the dealers and zones.

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T7. Q The answer is yes?

A Yes.

THE COURT: He answered. Next question.

Q You told him that a fleet certificate might help Nabcor to get a source of supply, correct?

A Yes.

Q You said in substance that a fleet certificate is not an actual General Motors requirement but that many dealers, particularly small dealers, think so.

THE COURT: Are you referring to the transcript?

MR. KLEINBARD: There is a transcript at the hearing, your Honor.

THE COURT: What is that?

MR. KLEINBARD: 569 and 570. We also have the pretrial brief, your Honor.

THE COURT: Go ahead.

Q Do I have an answer to the question?

THE COURT: Read the question, please.

(Question read.)

A That was part of a general conversation and we did in substance discuss that, yes.

Q A year before you met or almost a year before you met Mr. Belcher, you met Mr. Gray, isn't that right?

A Yes.

Q Your purpose in meeting Mr. Gray was to obtain a fleet certificate for Nabcor, correct?

A Mr. Gray was -- no, that was not my purpose.

Mr. Gray came to see me and as a result of Ruckle Pontiac applying for a fleet certificate for us.

Q Did you tell him not to?

A I did not invite Mr. Gray to come and see me. He came to see me, to investigate Nabcor or whatever purposes were in his mind at that time.

Q Did you know that Mr. Gray was going to come to see you in order to obtain information in connection with obtaining a fleet certificate?

A I didn't know Mr. Gray was going to come. I didn't know of Mr. Gray until the moment he appeared at my office in Yonkers and introduced himself and told me what his purpose was.

Q When he arrived you and he, whether invited or uninvited, you and he had a conversation concerning a fleet certificate for Nabcor, did you not?

A Yes.

Q In the course of that conversation Mr. Gray indicated to you that Nabcor was not qualified, isn't that correct?

A Of course, in that conversation -- no, he wanted registrations of automobiles that we had purchased, the discussion was on purchases of cars. The language at that time from what I understand was if a company purchased 10 cars or more, 20 cars or more a year, they could be entitled to a fleet certificate.

Q It had to register them in their own name, the name of the purchaser, correct?

A I learned that later from Mr. Gray.

Q I beg your pardon?

A I learned of it, that requirement, later from Mr. Gray.

Q That is what we are talking about.

A As the conversation went on, he then wanted registrations.

Q When Mr. Gray left after visiting you on that particular occasion in 1966, you knew that Nabcor did not purchase or register in its own name the 10 cars which were a minimum requirement for the issuance of a fleet certificate?

A Read that back, Mr. Reporter.

(Question read.)

A To be precise, I did not know that.

Q When did you know it?

A After a second meeting. At that time --

Q With whom?

A Mr. Gray.

Q After you had your second meeting with Mr. Gray did there come a time when you knew that Nabcor would not qualify for a fleet certificate under the requirements as they then obtained?

A At the second visit it now became 25 cars and they wanted registrations, tag numbers, as opposed to serial numbers which would indicate purchases. These then became a demand on his part that I give him 25 cars that were registered in our name and tag numbers.

Q Now, Nabcor did not register 25 cars in its own name as of that time, did it?

A That is right. We did not register 10, as I told him, in our first meeting, we sold cars.

Q In your first meeting when you asked for 10, you told him you didn't register 10, and in your second meeting which you recall took place he asked for 25 registrations and you said Nabcor didn't have 25 registrations in its own name, right?

A Not correct, Mr. Kleinbard. At the time of the first meeting we talked about purchases and he did not ask for registrations. He asked for serial numbers of cars purchased by us.

It was in the second meeting that he asked for tag numbers, registrations, in the name of Nabcor.

Q All right.

A So there is a difference between the two.

Q Fine. At the conclusion of the second meeting with Mr. Gray, you knew that Nabcor did not register in its own name 25 vehicles, is that right?

A We knew that all the time.

Q You were then learning it from Mr. Gray what the requirements were?

A I told --

Q You can say yes or no, Mr. Maiorana.

A In the first meeting and the second meeting that we did not register cars in our name like a lot of leasing companies and other people did.

Q Therefore you knew that as of the end of the second meeting Nabcor did not qualify for a fleet certificate, isn't that right?

A I didn't know at that time yet whether I did or didn't until --

Q You knew that you --

THE COURT: Let him finish.

A (Continuing) Until I was told by Earl Stewart that I was turned down.

Q How long after your meeting, the second meeting with Mr. Gray was that, a matter of days?

A A week or two, possibly.

Q So you knew some time in the beginning of 1966 that you did not qualify for a fleet certificate, right? I mean Nabcor, until the beginning of 1966?

A I was saying the beginning of 1967.

Q The beginning of 1967, all right.

A Or the latter part of 1966.

THE COURT: Are you fixing it as at the time ---

THE WITNESS: The time when Mr. Gray came to visit.

THE COURT: Late 1966 or early 1967?

THE WITNESS: Yes.

Q Therefore, when you came to see Mr. Belcher in December or on or about December 14, 15, 1967, you already knew a year before that Nabcor did not qualify for a fleet certificate, isn't that right?

A I knew that Mr. Walter Gray and the Pontiac Division turned us down for a fleet certificate.

But I did not know that we did not necessarily qualify for one because other leasing companies sold cars and there may have been some way that they could give us a fleet certificateif they wanted to.

Q In other words, what you are saying --

A I didn't know what the chairman of the board of General Motors could do as far as the policy of General Motors is concerned.

Q Am I correct, Mr. Maiorana, what you are telling me is although you knew from Mr. Gray that you didn't qualify, you thought perhaps something might be possible other than that?

THE COURT: That is what he said.

A I didn't know all of these policies.

THE COURT: Let's go on, next question.

Q Mr. Maiorana, in your first meeting with Mr. Belcher, didn't you in fact demand a fleet certificate for Nabcor for which you could not qualify?

A Absolutely not.

Q Or else you and Mr. Strimple would see to it that there would be a complaint filed with the Department of Justice?

A Absolutely not. I stated that I called my attorney and told him.

Q The answer is no?

THE COURT: The answer is no. Next question.

MR. KLEINBARD: I am about to move on to a new subject.

THE COURT: We will adjourn until 10 o'clock tomorrow.

(Jury left the courtroom.)

THE COURT: What is the problem about this?

MR. KAPLAN: The problem, quite simply, is this: I move to quash the subpoenas that Mr. Person has served on Marty Motors, Colonial Cadillac, Cerota Chevrolet and Bano Buick for a number of reasons.

First of all, when this subject of bringing in dealers in the middle of Mr. Maiorana's testimony first came up the other day your Honor made it very clear exactly who it was that was being called and requested that Mr. Person limit himself -- told Mr. Person to keep us advised of his plan and none of that has been complied with.

Furthermore, Mr. Person's pretrial brief, this 400-page document beginning at page 11 has a list of witnesses as to the liability of the General Motors group. None of the witnesses from Marty Motors, Bano Buick --

THE COURT: What page does that start?

MR. KAPLAN: Page 11. Witnesses from Marty Motors, Bano Buick and Cerota Chevrolet are not on it.

We have had to prepare this case in which at one time or another allegations have been made about more than six dozen different dealerships and it is impossible for us to prepare fully and thoroughly for this kind of case unless we can rely on what we are told as to who theparties are, what the issues are and who the witnesses are going to be. To spring on us --

THE COURT: He had a witness noticed, Hartzel.

MR. KAPLAN: He did not list the two Colonial Cadillac witnesses. I didn't mean to suggest otherwise. The others are not listed here.

I submit also had we known of those two on March 22, 1976, when we came in to your Honor to complain the witness list in the pretrial memorandum went beyond the witness list Mr. Person previously furnished pursuant to your Honor's direction, your Honor limited him to the prior list, the prior list which listed 99 witnesses on liability did not include these two. Your Honor said that if he ever got around to it he might depose a number of people including them and call them to trial conceivably. We had absolutely every reason to rely on the proposition that none of these people would be called, and I think particularly in light of your Honor's instructions of the other day as to keeping us informed of hisplans this is no time to start.

The notion that we should begin the taking of depositions of four more dealers on the stand, because that is what is going to happen, is mind-boggling.

MR. PERSON: Your Honor, we according to the discussions we had in your chambers were willing to try to uncover the truth and we did call Ruckle Pontiac and we did get the truth out of that. We got less truth out of Rohrer Chevrolet. In other words, it wasn't, you know, the most heartening evidence that I have ever heard in the world.

On the other hand, in order to go along with what we are talking about back there, I am not afraid to have the truth come in and if Mr. Kaplan finds a problem with that, that is --

THE COURT: That is really not going to help.

MR. PERSON: We subpoenaed Marty Motors and subpoenaed the Colonial Cadillac and Bano Buick in that vein, keeping Mr. Kaplan advised, and to my recollection, and I could be wrong, as I recall it, you said if I intended not to call any of the people that I had mentioned, that I should tell Mr. Kaplan and therefore I don't think that I was supposed to alert Mr. Kaplan before I sent the subpoenas out. I only served these people yesterday.

rp

With respect to Moe Cerota to Chevrolet Oldsmobile, Cerota in my discussion with him yesterday to try to clarify the Mark Stolarski event, quite clearly tells me that it is a requirement that a person have a fleet certificate before he can get a fleet allotment for cars.

Very clearly, unquestionably get a national fleet certificate and a zone or local fleet certificate and clearly --

THE COURT: So what?

MR. PERSON: Clearly contradicting other people who claim they knew nothing about whether a person must have a fleet certificate to obtain cars through the fleet allotment. He clearly states that is the case and a representation by General Motors, and I am sure unless they want to stipulate the contrary now --

THE COURT: I don't see that that gets us very far. Suppose that somebody thought that. Suppose General Motors --

MR. PERSON: That is what we complained about.

THE COURT: That isn't an antitrust violation to require a fleet certificate.

MR. PERSON: To enable the dealer to sell cars?

THE COURT: To produce cars for Nabcor without a fleet allotment.

If cars are in short supply, I assume that General Motors has to make some allotment among dealers, and that is not an antitrust violation, to my knowledge, and the exact mechanics of that I don't know.

I am sure also that the whole problem of the allotment comes up once in a while if cars are in short supply, and I am sure that a lot of times there were plenty of cars available and this whole problem of allotments just didn't even come into play. That is my impression from the witnesses thus far.

In any event, let us suppose some dealer didn't fully understand General Motors' policy and some dealer was telling Nabcor, "I have got to have a fleet certificate to get cars out of the fleet allotment because the Corvettes are now in short supply." I say so what?

MR. PERSON: Your Honor, the fleet system of selling cars by the dealers, that is when the dealer supplies a car on a so-called fleet basis, a fleet order, he is getting a fleet allotment and he is only permitted to do that if he sells somebody on a list that GM approves. That is this white list, and it should be illegal.

THE COURT: I don't know what the white list is.

MR. PERSON: Approved customers that a third party may sell to.

THE COURT: That is your say-so, you haven't begun to introduce evidence to support that, you have not begun and there is nothing you mentioned about Cerota that equates that with this case.

MR. PERSON: If it is a requirement for a fanchised dealer of GM only to sell cars on a fleet basis to a new company that meets the approval of GM, that is illegal. You can't have GM telling a dealer who he can sell cars to. They restricted the dealer from reselling, which is exactly what the General Motors decision is all about, prevented him, the retailer.

THE COURT: You can argue that all you want, I just don't buy that, and you are talking about something so different from the Los Angeles General Motors case. Let's go back to the question of the allotments.

Let's assume for the moment that we are in

3

a period, say, the beginning of the model year or beginning with a very popular car or, for one reason or another, cars are in short supply.

Now, General Motors I assume has to make allotments. The little testimony that has been produced, and I think it mainly came from Mr. Dillon, was it?

MR. KAPLAN: Yes, your Honor.

THE COURT: His testimony wasn't as illuminating as it may be, because he ended up saying he never had any problem, "I got all the cars I wanted all the time." Apparently he was a big dealer and just gets cars.

But his testimony was that if the allotment problem came in to play at all, then there would be as a kind of preliminary thing, a retail allotment, and then if a dealer had more customers and more demand for cars than he could satisfy on a retail allotment, then there was something called a fleet allotment.

MR. PERSON: No, your Honor. The fleet allotment --

THE COURT: Let's get his testimony.

MR. PERSON: I have testimony from officers or people that headed up the fleet department. I have some testimony on this from Mr. Berg and Mr. Olson and the fleet allotment was a certain percentage of production of General Motors' five divisions set aside for people that were qualified fleet accounts; people that General Motors had in fact on this National Acc-unt List would be the persons who could make use of the allotment going to the dealer.

THE COURT: Let's just pause, though. Make use of the allotment. Now,let us just pause on the words "the allotment."

MR. PERSON: The fleet allotment.

THE COURT: Anything you want to say, fleet allotment, the allotment.

Now, let's suppose Mr. Maiorana goes in to Ruckle Pontiac or Rohrer Chevrolet -- let us take Rohrer Chevrolet -- and he says,"I want to buy 200 cars this year."

Now, if you are talking about allotments -- let's suppose that Rohrer can get all the cars it wants, there is no shortage, there is no foreseeable shortage and no shortage materializes. Thousands of cars are available for the asking by Rohrer, and this 200 is no problem to fill as far as quantity -- just bear with me a minute.

Now, there is no evidence, to my knowledge in this case -- maybe you got something to the contrary -- but there is no evidence to my knowledge in the case thus far to indicate that anybody would even be worrying about an allotment so long as there were plenty of cars.

It could come out of the retail allotment, it could come out of the fleet allotment or whatever, just as Dillon said, he never even thought much about allotments, period.

Am I right, Mr. Kleinbard, or am I --

MR. KAPLAN: You are absolutely right.

MR. KLEINBARD: Right, your Honor.

MR. PERSON: That is not quite --

THE COURT: Is that right, Mr. Person, or wrong?

MR. PERSON: You are wrong.

THE COURT: In what way am I wrong?

MR. PERSON: The retail allotment supplies a limited number. It is something given to the GM franchisee, which allows him to sell up to a certain number of cars during that period and no more, on a retail basis.

THE COURT: But, Mr. Person, the point is, if there are plenty of cars, let us suppose the retail allotment in theory would be for a particular model for that model year, one thousand cars. Let's say General Motors has so many cars they can give a thousand cars of that type.

Let us suppose that the dealer has, his estimate is that he would need five hundred cars or two hundred cars. He is not going to think about the allotment, he just gets all the cars he wants, he is not rationed, it is not limited, he has all the cars he wants.

I am trying to concentrate for the moment on the situation where the cars are plentiful. I know they are not always plentiful, there are times when cars are plentiful.

MR. PERSON: Absolutely, your Honor.

THE COURT: When cars are plentiful, then let us assume the situation which I think existed once in a while, that there were more cars available to that dealer, as many cars available to this dealer as they could possibly sell. Let us assume at least on the retail side, right?

MR. PERSON: Okay, let's assume that.

THE COURT: I think it might have happened a few times in the history of these years.

Now, if that is the case, there isn't any limit on what the guy can sell retail, he can get all the cars from General Motors he can possibly get orders for, so he isn't worried about the retail allotment.

Let's go to the fleet side. Let us suppose again that the production is so great and the popularity of the car is not so great, perhaps. General Motors has all the cars and they are willing to supply this dealer with all the cars that he can sell retail, fleet, any way you want it. The cars are plentiful, it is a buyer's market or whatever.

Now, again, it seems to me that if that is the situation the question is in that situation can General Motors tell a dealer, "You can only sell cars labeled fleet to someone on a list"?

MR. PERSON: Yes. You are telling me that?

THE COURT: You are telling me that?

MR. PERSON: Yes, your Honor.

THE COURT: Where cars are plentiful General Motors orders its dealers to restrict sales to people on a list?

MR. PERSON: Right, there is a paragraph here.

THE COURT: I want a yes or no answer from you and I don't want a lot of evasion because you have wasted an awful lot of my time, and I don't want it to continue. I want a yes or no answer.

MR. PERSON: What car company, what division?

THE COURT: Are we talking about Volkswagen ?

MR. PERSON: The Cadillac Division.

THE COURT: I want to talk about Chevrolet.

MR. PERSON: Chevrolet.

THE COURT: Give me a yes or no answer.

MR. PERSON: Today most of the dealers --

THE COURT: I don't care about today. I don't care if we stay here until 9 o'clock tonight, I want to get an answer from you. I think you asserted something to me before and you either stand by it or you don't.

My question is, when Chevrolets are plentiful in the period we are talking about, so plentiful there is no shortage in any sense that we could conceive of, are you telling me that General Motors directed its dealers to limit sales of cars where the orders were designated fleet to a limited list of customers? Was that true or wasn't it, yes or no?

MR. PERSON: You said fleet? To the fleet allotment?

THE COURT: No, I was very careful in my question, Mr. Person, because the mechanics we have gone through and we are talking about orders in General Motors where the little box "Fleet" is checked.

MR. PERSON: Right.

THE COURT: And thus General Motors is apprised that this is a fleet situation, whatever that means.

MR.PERSON: Correct.

THE COURT: Are you telling me that where such orders were placed with the box "Fleet" checked, are you saying that in terms of ample supply and no shortage General Motors directed the dealers not to resale those cars except to a specified list of customers?

4 MR. PERSON: I don't think that I can demonstrate that a dealer cannot sell cars at a time when there should be a substantial supply.

THE COURT: The answer, then, in one word to my question is no, you don't contend that. Do you?

MR.PERSON: Well, your Honor, it is more complex than that.

THE COURT: I don't think it is. We have gone through enough in this case, and that is a very clearcut question.

MR. PERSON: Let me put it on the record and then skip over it. There is a policy of evaluating the dealer's performance under the franchise agreement which takes into account sales that the dealer makes that first appears through the R.L. Polk registration in his own territory.

To the extent the dealer would sell cars registered outside the territory he runs the risk of having the retail allotment reduced by cars that fail to appear in the territory. That is one factor, that is the factor that caused the Colonial Cadillac to first title cars in Mercy Leasing and resell from Mercy.

THE COURT: That is so different. I think you earlier told me in a statement which I believe has now turned out to be untrue --

MR. PERSON: I referred to a Cadillac and I have something in my hand if I could read a paragraph. I was referring to Cadillac in this instance.

THE COURT: Certainly I was under the impression you were making a more general statement.

MR. PERSON: It says that General Motors let Kemp know regularly by zone personnel, General Motors insisted the cars alloted to Kemp for resale were to be sold in areas designated in the General Motors agreement with Kemp as Kemp territory.

THE COURT: That is a completely different problem.

Mr. Person, there may be problems, but the only way my mind can work is to concentrate on one thing at a time, and if you tell me that a certain thing occurred with General Motors, I either can rely on you or I can't, and it is not an answer to say that something else occurred, because that produces a confusion at least to my inadequate mentality.

MR. PERSON: Could you have Mr. Kaplan state the General Motors policy as to the retail allotment for Chevrolet dealers back in that period? I am sure he knows.

THE COURT: That isn't the point.

MR. PERSON: If it's an issue, then maybe he can stipulate that there was such a thing as a retail allotment. And then to explain it, which I am trying to do. I don't hear Mr. Kaplan talking.

THE COURT: Mr. Person, the start of this long harangue was an indication, a statement to me, and I know that if we took the time I could find it, to the effect that General Motors limited fleet sales or resales.

MR. PERSON: Fleet sales.

THE COURT: To the specified lists, and you said that is illegal.

MR. PERSON: I believe so.

THE COURT: Okay. Now it turns out that you don't mean that.

MR. PERSON: I do mean that, your Honor. In other words, that GM has a -- that our contention is, and I think that we have evidence to show, and I have it here through this affidavit, the person who signed it will be here, and through several other sources, that the fleet allotment which gives the right for the dealer to sell a car to a person

jkjw 2

is only exercised by that dealer for people who are approved by GM, and I contend that that is a violation of law to have GM set the terms of a wholesale transaction.

THE COURT: You are talking about periods of short supply.

MR. PERSON: I cannot define exactly-- I don't know, your Honor, what the scope of that is.

THE COURT: Because Mr. Person, it makes a lot of difference in our analysis of this case if we are dealing with some kind of a restriction which GM imposes willy-nilly, whether there is short supply or long supply; that would be a very grave problem, but if we are dealing with some other problem, then let's face the other problem.

If we are dealing with the problem of making a record so that a dealer has a record of purchases for statistical purposes in the event of short supply and figuring allocations, that is what I call another problem, and whether you are dealing in automobiles or bananas, it is a familiar practice in the commercial world that when periods of short supply come, someone like

jkjw 3

General Motors has to have a basis for allocation, and usually they don't have the basis, you know, the color of the guy's hair or whether they play golf with him. They do it on a historical basis, and I am sure that there are some fairly complicated rules on how to figure the historical basis.

I am talking off the top of my head because the evidence here has not revealed much if any in the way of a grave allocation problem at all.

But I'm just saying to you that I don't regard it as an Antitrust violation, number one, if in periods of short supply General Motors figures out a method of allocating cars among dealers, two, if they do it on a historical basis, and three, if they use a historical basis and develop some rules and regulations.

MR. PERSON: But it doesn't work that way.

THE COURT: Well you are saying so, but at least that is a problem, and if you want to go into the rules and regulations that are used by General Motors to figure out allocations at times when allocations are necessary, we can go into that, but at least let's not confuse that with some other problem.

That's all I ask.

MR. PERSON: Fine, your Honor.

THE COURT: Now, if we are also dealing with actual periods of short supply and problems of Mr. Maiorana in getting cars in times of short supply, where allocations are indeed applied, let's deal with that problem, but let's know we are dealing with it, and not confuse it and fudge it around with a lot of other problems.

MR. PERSON: Colonial Cadillac was at least, I think, a six month period of orders picking up at Colonial; no orders out of forty-four were delivered, so the allocation didn't work.

THE COURT: Maybe no cars were allocated for sales to Mr. Maiorana and that may or may not be an Antitrust violation, but let's at least understand the problem.

If it's a short supply problem -- all I say at this moment let's face it.

Is Colonial Cadillac a short supply problem?

MR. PERSON: It was a no supply

problem to us.

THE COURT: That is just rhetoric.

MR. PERSON: No, your Honor, we had him here and we weren't able to go into that and I want to bring him back and let him explain.

THE COURT: But you don't know what you are contending. You don't know anything about the circumstances, you don't know anything about the background.

MR. PERSON: We had delivered orders to him and over a long period of time he delivered no cars against those orders.

THE COURT: Do you know, Mr. Person, whether that involved a situation where Cadillacs were in short supply? Do you know?

MR. PERSON: I can't say. I don't know --

THE COURT: Did you ever try to find out in the six years this litigation has been going on?

The answer is no, so we start groping around.

MR. KLEINBARD: Your Honor, may I just say something?

jkjw 6

THE COURT: Yes.

MR. KLEINBARD: We have all had a very long and strenuous day, but as far as certainly -- I think the question here is primarily, as far as we are concerned, one of procedure, that is how are we going to get this case tried, and there isn't any question in our minds as to truth, justice and all these other things that Mr. Person is referring to.

But we cannot try this case as if it was an accordion and have it being expanded and expanded and in effect having depositions taken during the middle of the trial.

As to the Cadillac issue, your Honor --

THE COURT: Let me just interrupt you. The thing is that I positively encouraged the subpoenaing of the witnesses from Ruckle and Rohrer because I felt that these two instances were somewhat central to the question of whether the plaintiffs had a case.

Now, we have heard what we have heard.

I have expressed to you a number of times, to everybody, my opinion that this, the evidence in this case is quite unsatisfactory no matter how you view it. If you don't have the dealers in then you don't have the people in who presumably know the facts.

If you do have them in, you are, I am sure, expanding the case to some extent beyond what was contemplated when we commenced this trial, you know, at earlier stages, and we have an extremely unsatisfactory situation of having Mr. Person put on witnesses he has never seen before and having documents brought into court that have never before been produced, so we have discovery in the middle of the trial before the jury.

I have expressed myself almost to -- I just can't tell you how dismal I think that situation is.

On the other hand, what I am trying to inquire about here, and this is the reason for all this, I think as unsatisfactory as this may be, some judgment as to these witnesses may need to be taken as to whether there is any prospect of anything being gained from it.

Now I will say to you that as far as this Cerota thing and the drop shipment, I think that is very peripheral. There are other much more grievous and much more central allegations, and to have discovery in court about people on the question of whether there was a drop shipment or not, and whether General Motors indeed had regulation about drop shipments, considering all the other problems in the case, including both liability and danages, where we are, you know, badly floundering in many ways, I just -- I put that at the bottom of the list.

Now, I have to, and I don't think it is a normal function, I don't think I should be in this position, but I have to make some kind of determination as to what the promise is of yielding any useful information. I just don't think the Cerota Chevrolet is worth a candle.

MR. PERSON: It gives the retail and the fleet allotment perspective with the use of a fleet certificate being required to get the fleet allotment. I think that is very important.

THE COURT: Cerota Chevrolet.

MR. PERSON: He is testifying as to, the practices.

MR. KAPLAN: Can I add one thing about that?

THE COURT: Let's get back to Colonial Cadillac.

MR. KLEINBARD: I wanted to add something there, your Honor, about that.

THE COURT: YOu say that there were all these orders not filled. You know nothing about the circumstances. You know nothing, according to what you say, about whether the cars were in short supply or long supply and so we are in a position of going into a bunch of transactions or whatever it is --

MR. PERSON: They're all the same.

THE COURT: There are all the same-- I haven't seen anything the same so far.

MR. PERSON: Forty-four identical things. There is no variance.

THE COURT: Over what period of time?

MR. PERSON: I think about six months.

MR. KLEINBARD: Your Honor, there has been testimony here before your Honor back in 1973 that the Cadillac is a limited production car.

THE COURT: Sure it is.

MR. KLEINBARD: There has also been, in his own prospectus, in the NABCOR prospectus, it calls the Cadillac a limited production car. These orders were given primarily in the early part of the model year, because I know they are in the plaintiff's pretrial brief and I have read it.

And in addition to that they probably, I think, and at the date the statute of limitations, but with all of these things combined, how this can be put in the same category as a Chevrolet or any of the other cars, I just can't imagine, and why we should at this point be taking testimony on that matter, which I had assumed was laid to rest back in 1973 --

MR. PERSON: That was never, we were never allowed to go into this and that was a very important part.

THE COURT: The only thing is, Mr. Person, I do remember, maybe there was only one or two cars involved.

MR. PERSON: Only because that was the most recent of a long history of dealing.

THE COURT: My individual memory is that the people at Colonial, they had no problem at all of processing a NABCOR order, and the only reason it didn't get filled, if it didn't get filled, was because NABCOR was -- you know, did everything conceivable not to fulfill its obligations. They wouldn't make the payments, they wouldn't take things on time, on and on and on.

And I have a decision on that, if I recall.

MR. PERSON: That is correct but limited to that one transaction.

THE COURT: But does that really show any promise of showing that they were in a conspiracy?

MR. PERSON: Absolutely.

THE COURT: At some earlier time.

MR. PERSON: It continued to the end of the year and all the orders were not filled at all. We had to replace them with Marty Motors.

Subsequently Mr. Murray was willing to deal with NABCOR again. That was in April 1971 that he was willing to deal again with NABCOR. So that --

THE COURT: All I am saying is this, I just don't know the answer, but I know this, that I am not going to interrupt Frank Maiorana's cross. We are not going to have an on and off again situation. His cross will be completed.

MR. PERSON: Okay.

THE COURT: And I also want to figure out a way to crystalize the issues both on liability and damages once and for all.

I urge you to get busy on the damage claims because I have a feeling you really don't know the specifics of your claims, and so we might be in the position of going through a lot of travail in a trial, a lot of witnesses, a lot of issues.

Okay, where do we end up? Is this a $50,000 case? Is it a $100,000 case? Is it a million dollar case? What is it?

Now I know you could probably announce to me now it was a $50 million case, but that announcement doesn't do anything for me.

MR. PERSON: True, I understand.

THE COURT: I want to know chapter and verse, and I want to know chapter and verse if I have to come down here Sunday night and sit around with you fellows and do it, and that may be what I've got in mind, because I do not want to go back before this jury on Monday morning and continue the unformed character of this case.

And I have spoken to you, off the record, but certainly there is no secret, I have asked the parties about settlement, and I intend to pursue that, and I feel obliged to pursue it, and the awy I am going to pursue it is to find out something sensible about what this case amounts to in terms of damages, and what the proof about damages will be, and what are the specifics, what are the -- where are the orders that were -- I mean, how many orders were obtained from these brokers, what were these brokers doing, what was their actual business track record.

Now you, of course, say that their track record was impaired because of the activity of General Motors.

Well, that is a matter of proof, and it can be dealt with in proof. But I want to know from evidence.

In other words, there are all kinds of possibilities. You can have a broker who was working hard, and he was getting a lot of orders, and then he goes to NABCOR and the door is slammed, he can't get his cars. That is one -- if that's continue the unformed character of this case.

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In other words, there are all kinds of possibilities. You can have a broker who was working hard, and he was getting a lot of orders, and then he goes to NABCOR and the door is slammed, he can't get his cars. That is one -- if that's

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happened, that is one picture.

But if you've got a picture of a broker who is doing this thing very casually, out of six months of operation he develops three prospects and gets three orders, and if those orders are filled, that is another thing. And so I want to know.

As far as these subpoenas, I want to say this: We will sit tomorrow, and I have a few problems of my own the rest of the week; we will sit tomorrow from 10:00 until 12:00. Then we will sit from 2:00 until 3:00. Friday is another one of those every other week motion days. And then we will reconvene on Monday.

Now Friday will give you people a chance, you have a somewhat short day tomorrow, and you have got Friday, and you have the weekend. I'm only sitting from 2:00 to 3:00 in the afternoon. And then I've got some heavy engagements, not heavy, but I've got some things this weekend, meetings, and so forth, but I am very seriously considering having you come in, meeting down here Sunday afternoon, and talking about this, getting this case organized. I'm not going to take up any more jury time. We are in a bad enough shape on the jury time as it is..

But I think you'd better plan, Mr. Person, you'd better get your proof in shape on this damage question, because it isn't a matter of saying, oh, well, we had a concept, we had a potential, and so forth.

MR. PERSON: I understand, your Honor.

THE COURT: It is really ridiculous to have a long, long involved trial and not know what your damage is, not know in spades what your damage amounts to.

MR. PERSON: It's a question of extension of figures and we know the orders --

THE COURT: Okay, it's worth it to me if we sit around here all Sunday night. I want to get that buttoned up.

So you count on being back here.

MR. PERSON: What time, your Honor, on Sunday?

THE COURT: We will talk about that.

MR. KLEINBARD: With respect to the subpoenas, your Honor.

THE COURT: The subpoenas, I think you

have to apprise the people on the subpoenas that in no event are they going on tomorrow. We are finishing the Maiorana cross.

I have to leave you somewhat up in the air about what to do about that, and I regret that, but I just have to say to you that I don't know the answer.

If there are a relatively few instances which will throw some promise of illuminating the case, and if you have interviewed these people -- I know no depositions have been taken, but if you have interviewed them so that you are prepared to that extent, then I would consider having a limited, very limited amount of proof about other dealers.

I know that doesn't help you at this moment, but I am not in the position right now to shut it off, and I am not in the position to turn it on.

I just really don't know.

MR. KLEINBARD: Your Honor, I hope you won't misunderstand what I am about to say, but I think that I would have sufficient disagreement as to whether this is an appropriate procedure for the Court to take at this point, that I might move for a mistrial. We don't need to argue that now.

THE COURT: Well I won't grant the motion for a mistrial. I am not granting motions for mistrial.

MR. KLEINBARD: But I just --

THE COURT: He listed the Colonial Cadillac people in his witness list so as far as that is concerned, and I don't think there is any ironclad --

MR. KLEINBARD: I think your Honor's ruled them off the list at the prior pretrial hearing. I haven't got the transcript reference at my fingertips. Maybe Mr. Kaplan does.

Do you have the transcript reference? I just --

MR. KAPLAN: March 22, 1976, we asked your HOnor to rule that the additional people listed in the plaintiff's pretrial brief who were not on the witness list furnished in October 8th of 1974 couldn't be called. Your Honor so ruled at pages 43 to 48 of the transcript.

I want to say with respect to the prior list that these two witnesses from Colonial

jkjw 18

and only them appeared in a portion of thelist designated as people who might conceivably be deposed but not in that portion of the list which the plaintiff's represented were their trial witnesses. And none of the others we are discussing were on any of these lists.

MR. PERSON: The Marty Motors matter--

THE COURT: What is involved with Marty Motors?

MR. PERSON: They were selling Cadillacs and Oldsmobiles to NABCOR but hiding the title for the Cadillacs, hiding it from the zone whereas with --

THE COURT: How do you know that? Again, you haven't talked to them. Where is your information, from Mr. Maiorana?

MR. PERSON: Yes, and several others.

THE COURT: What are the several others?

MR. PERSON: I have Anthony Maiorana, Jack Snyder, Ernest Turco.

THE COURT: These are all people on the plaintiff's side.

MR. PERSON: Yes, your Honor.

MR. KAPLAN: I think also with respect to the statement about Anthony Maiorana, your Honor may be interested in the following testimony from Anthony Maiorana's deposition:

"Q Did Marty Motors ever refuse to sell Oldsmobiles to NABCOR?

"A Not that I can recall right now, not that I can recall, no.

"Q Did Marty Motors ever refuse to provide Cadillacs for NABCOR's customers with the title being put in the customer's name?

"A That I don't recall. Right at this point I would have to refresh my memory if there was any."

THE COURT: Mr. Kleinbard, I would think about this overnight, and as of now, certainly those subpoenas are held in abeyance, and nobody is required to attend them until further notice, and I will think about this overnight.

So I have a list. The subpoenas are directed at whom?

MR. PERSON: Colonial Cadillac, the two witnesses you have seen already, Marty Motors, the general manager and the owner. Bano Buick --

THE COURT: What is the purpose of getting Bano Buick?

MR. PERSON: We were dealing with Marty Motors and Bano Buick together.

THE COURT: Did you buy cars from Marty Motors?

MR. PERSON: Yes, and Bano Buick.

THE COURT: You say they concealed.

MR. PERSON: Marty Motors would not sell the Cadillacs directly but required that the cars be --

THE COURT: Marty Motors was a Cadillac dealer.

MR. PERSON: Cadillac-Oldsmobile. Olds were sold direct to NABCOR.

THE COURT: Marty Motors wouldn't what?

MR. PERSON: They would not sell the Cadillac's direct and required that the title be made out to the customer of NABCOR.

THE COURT: And Bano did that same thing happen?

MR. PERSON: No, Bano Buick was not a case of hiding title, but in the case of Marty Motors and Bano they ultimately refused to sell.

jkjw 21

THE COURT: Did you buy from Bano for a while and then they refused to sell?

MR. PERSON: Yes.

MR. KAPLAN: There is another point about that. They bought for years, and the alleged refusal by Bano was after 1971, after the complaint, and Bano ought to be excluded for that reason as well.

THE COURT: So we have got -- then Cerota we have covered, so you have got Colonial, Marty, Bano and Cerota.

Anything else?

Were those the subpoenas?

MR. PERSON: Those are the four, your Honor, yes.

THE COURT: We will talk about it quickly tomorrow morning.

(Adjourned to Thursday, November 4, 1976 at 10:00 o'clock a.m.)

end take
end day

pgrl

NATIONAL AUTO BROKERS CORP., et al.

vs. 70 Civ. 5 421A

GENERAL MOTORS CORPORATION, et al.

November 4, 1976
10:00 a.m.

Trial resumed.

- - -

(In the robing room)

THE COURT: Mr. Person has provided a revised witness list dated today. I would like to focus immediately on page 2 which refers to proposed witnesses from General Motors dealers.

We have already had some of these. We have had Walter Grimm, Earl Stewart and Robert Dillon. We have had Hilda Madden, William Lovell and Mr. Koch.

The items of contention relate to the other proposed witnesses, namely, witnesses from Marty Motors, Kemp Pontiac-Cadillac, Colonial Cadillac,

8917

Cerota Chevrolet and Bano Buick, a total of eight witnesses.

One thought that comes to me, after our talk last night, is this:

I will assume for the moment that General Motors could go through the record and cite me proceedings in which the list of witnesses was fixed and limited. The question still arises as follows in my mind, and I want you to consider this and we can perhaps talk more at the recess. I don't want to keep the jury sitting there too long.

I believe, and you can correct me if I am wrong, after these witness lists were fixed, we decided or I decided, and the defendants concurred and the plaintiffs objected, to having the preliminary hearing, which resulted in the exclusion of the so-called hearsay conspirator statement evidence.

I rather think, although again maybe I'm wrong, that the witness lists, which were arrived at earlier, were probably based, at least in the plaintiffs' attorneys' minds, on the idea he could put on his conspirator hearsay statements.

When the decision came to excluse that type of evidence I do not believe that we focused, anybody

pgr3

focused, on whether there would or would not be any revision in the lineup of witnesses in view of the exclusion of that type of evidence, in view of that ruling on the preliminary hearing.

My memory is that the question at least was not dealt with by me in express terms and expressly focused on.

I think what happened is that Mr. Person, from all indications, moved forward on the basis of his hold witness list thinking he would do the best he could with his original group of witnesses, namely witnesses from the plaintiffs themselves on the alleged facts.

Then, as we all know, I found that to be unsatisfactory and I tolk the initiative and sparked the calling of the wintesses from Rohrer and Rucklè.

That apparently has led to the suggestion of some other similar witnesses. But I have a bit of a problem in enforcing, as such, the limitations of the old witness list when we may well have had a change of circumstances which would make it appropriate to have some limited departures from those witness lists. I must presume that Paul, Weiss, the defendants, have gained a substantial victory in the decision they won as a result

pgr4

of the prelminary hearing, but I'm a little concerned in keeping the lid completely tight and not allowing any adjustment in the witness list in view of the results of that hearing.

If we were offered now a vast number of witnesses from auto dealers, that would be one thing; but I find this not an unlimited proposal. I find it a limited proposal, and I would just like to have you all consider this -- we can take it up again at the recess, but this is my thinking now -- if we have a limited proposal and if this is it, and I assume it is it --

MR. PERSON: It is.

THE COURT: -- because I asked for it and not a lot of indefiniteness and Mr. Person has come up with it, then we don't have really a situation where the case is like an accordion, just expanding constantly.

MR. KAPLAN: May I respond?

THE COURT: I'm not trying to deal with the other elements of this.

MR. KLEINBARD: I think your Honor made the assumption yesterday we interviewed all of these people.

THE COURT: No, I did not.

MR. KLEINBARD: I did not respond.

pgr5

As to Kemp and Cerota, we have not, so I think it would be highly prejudicial for us, at this time, because had we any clue that these people were going to be called we would have interviewed them.

THE COURT: Kemp is somebody you didn't refer to last night.

MR. PERSON: Kemp and Kelleher have companion affidavits which have been in evidence or on file since 1973.

THE COURT: What is their significance?

MR. PERSON: They will say what the policy of GM was when they ran the Pontiac-Cadillac dealership in 1969.

THE COURT: What policy?

MR. PERSON: The policy concerning the necessity of having a fleet certificate in order to get a fleet allotment.

MR. KAPLAN: If I can outline this problem, they arenot witnesses on any boycott claim at all. Nabcor never dealt with them and has nothing to do with them. He's calling them because he thinks they have things to say on a so-called structural case.

These two specific people surfaced in this case in 1973 and when we applied to your Honor --

THE COURT: Surfaced in what way?

MR. KLEINBARD: Mr. Person filed affidavits in a temporary injunction motion in 1973. When he served his witness list in 1974 they were not on it. In '76 when he served the pretrial brief they were in it again and they specifically were among the reasons we came to your Honor and asked your Honor to cut back to the original witness list. The reason we did it is this:

Kemp Pontiac-Cadillac has been involved in an enormous antitrust action in Connecticut.

MR. PERSON: It's over.

MR. KAPLAN: I know that. He charged everybody in the State of Connecticut, Kemp, including half of the co-conspirators in this case with conspiring to fix prices there. He eventually lost his dealership there. He is, if I may use the phrase, "one of the malcontents" of the automobile business. We deliberately abstained from even talking to them, much less taking their depositions in reliance on prior rulings.

THE COURT: Let me say this: I am willing to make an adjustment on the witness list to compensate you, so to speak -- I'm not using the right words -- for the change of circumstances resulting from the preliminary hearing. From what I hear now I don't believe the Kemp Pontiac falls in that category so I will not permit the Kemp Pontiac-Cadillac witnesses.

As far as Cerota, I take it, of course, that Moe Cerota has not been interviewed.

MR. KLEINBARD: Not by us.

MR. PERSON: He has by me.

THE COURT: I'll bend over backwards in Mr. Person's favor and let him put Moe Cerota on. I have very serious doubts whether this will lead to anything but he can try. I'm not going to sit here in advance and preclude that.

The Colonial Cadillac witnesses can be subpoenaed and brought here.

The groundrules for their testimony I will not try to predict. If the testimony reaches beyond proper time periods or raises some other problems we may have to take some action to cut it down. I can't predict that.

The Marty Motors witnesses I will permit.

Bano Buick I will permit.

The only people on the list I am going to strike are Kemp and Kelleher from Kemp Pontiac Cadillac.

I don't know what other problems there are about this list but I won't try to cover thatnow. That will let you know where you stand on these problems.

MR. PERSON: I would propose to use them as rebuttal witnesses.

THE COURT: I don't know what you need. Rebuttal is a different story.

MR. KAPLAN: Who will follow Frank Maiorana, your Honor?

Secondly, can we have a ruling that these dealer witnesses don't come on before Tuesday or Wednesday so we can get ready?

THE COURT: I want to confirm that hte cross-examinationand the redirect -- Mr. Maiorana should be finished subject to recall to prove prior inconsistent statements denied by witnesses. He's always subject to recall on that specific point. But basically his examination should finish without further interruption.

MR. PERSON: Are you talking about the liability? I can put him on subsequent on damages. This takes the focus on what happened to Nabcor if --

THE COURT: I don't know what to tell you about the damage case. The testimoony that you offered at the end of his direct was really just inadmissible.

Obviously you have to have an opportunity to prove damages, and, you know, with 20-20 hindsight I think that the damage question should have been gone into more thoroughly on pretrial and the damage issue should have been organized so that you could have finished up with Frank Maiorana with proper testimony on the damage issue. To have the specter of him coming back on damages is not a very good thing. I don't relish that at all.

All I can say to you is that you were certainly led to believe by me at the end of his direct that you really had to desist at that point and get the thing organized and I have to let you prove damages by whatever witnesses are appropriate.

I am very serious about gathering here on Sunday. I will try to do it in as humane a way as possible for all concerned but I'm serious about that, when we have some time to talk about this damage issue. I smell the fact that this has not even begun to be organized.

I want to say this about the cross-examination of Mr. Maiorana: I'm not the jury. I don't mean to second guess you, Mr. Kleinbard, but I do think it's

THE COURT: I am afraid Frank won't finish today. This will work out, Mr. Kaplan.

MR. KLEINBARD: Just a second, your Honor, for the record may I have an objection to this particular procedure?

THE COURT: Surely.

MR. KLEINBARD: Thank you.

(In open court.)

2 FRANK MAIORANA, resumed.

THE COURT: All right, Mr. Kleinbard.

CROSS EXAMINATION CONTINUED

BY MR. KLEINBARD:

Q Mr. Maiorana, after your meeting with Mr. Belcher you claimed to have met with Mr. Drury of GMAC?

A Yes.

Q GMAC is the automobile financing division of General Motors?

A I believe it is, yes.

Q And you told Mr. Drury that Nabcor would go into the leasing business in a small way, assuming GMAC would finance the purchase of the necessary cars?

A This was in conjunction with my efforts to cooperate with General Motors to solve the problem they had created, Mr. Kleinbard --

THE COURT: Just a minute. Look, unfortunately, a fair amount of this trial is consumed by lectures. I very much regret that.

But I tried to desist yesterday afternoon and what we had was a complete chaotic argument between you and Mr. Kleinbard. So I enter the fray again.

I am going to say to you and I am saying to you if I have to in response to every single answer, that it is your job to listen to Mr. Kleinbard and to answer his questions and do nothing more. You repeatedly as evidenced by this last answer, go beyond his question and make a speech explaining this or that point. It is improper and I will not permit it.

I don't know what I will do, but I will do something to stop it, and now read the last question and the last answer, and then I will strike part of the answer.

(Record read.)

THE COURT: The answer was unresponsive. I think it is implicit in your answer that the proper answer to Mr. Kleinbard's question was the one word, yes, and I will assume the answer is yes, and will strike your answer and go on to the next question, Mr. Kleinbard.

Q Mr. Maiorana, you submitted an affidavit to the Court in which you adopted as your testimony certain pages of the pretrial memorandum filed on your behalf by your counsel; isn't that correct?

A Yes.

Q Those pages include the following description of your statement to Mr. Drury and I am reading from page 77.

THE COURT: Let me get that, please.

Q "Nabcor wanted a fleet certificate and the offer by Nabcor was conditioned upon Nabcor getting a financing line from GMAC to buy the cars needed to get a fleet certificate. This would make it look as if Nabcor is in the leasing business to GM's franchisees."

Mr. Maiorana, what was Mr. Drury's reaction to this proposed deception of GM's franchisees?

THE WITNESS: Your Honor, this requires an explanation, doesn't it? I don't know how to answer the question yes or no or how to be responsive in line with what he asked me.

THE COURT: The question has not been objected to by your counsel, and therefore --

MR. PERSON: Just answer the question. It doesn't require a yes or no. Just answer the question.

THE COURT: What was Mr. Drury's response?

A He said he would see what he could do to help in cooperation with Mr. Belcher's request and gave me the name of Speece and Di Simone to contact in the Philadelphia zone.

Q The fact of the matter is, Mr. Maiorana, that Nabcor had not rented or leased any automobiles as of the time that you claim to have had this conversation with Mr. Drury, isn't that correct?

A Yes.

Q Now, at your meeting with Mr. Drury, who I believe you said was head of GMAC, is that correct?

A Mr. Belcher said he was head of GMAC.

Q You went there under that assumption, is that right?

A Yes.

Q At that meeting did he ask you for any financial information?

A No.

Q Did you give him any financial information?

A Not that I recall, no.

Q I believe you said in answer to my two or three questions back that he suggested you make your application through Messrs. Speece and Di Simone, is that correct?

A No, that is not correct.

Q What did he do with respect to Mr. Speece and Mr. Di Simone?

A He just simply gave me the names of Speece and Di Simone.

Q Are you positive that Mr. Drury suggested that you contact Mr. Speece?

A Yes.

Q Mr. Speece worked for Chevrolet and not for GMAC, is that correct?

A That is correct.

Q You are positive now that you spoke to Mr. Speece?

A Yes.

Q You were asked a year ago at that time at your deposition whether you spoke to Mr. Speece, and I am reading from your deposition at page 1773, October 7, 1975:

"Q To the best of your recollection did you ever speak to Mr. Speece?

"A I dont recall it. I may have."

But now, Mr. Maiorana --

THE COURT: What is the date of the deposition, please?

MR. KLEINBARD: October 7, 1975.

Q But now, Mr. Maiorana, after speaking to your attorney and adopting his pretrial brief, you remember not only that you spoke to Mr. Speece, but you testified on direct as to the substance of your conversation with him eight and a half years ago.

THE COURT: Is that a question?

Q Is that correct?

A You made a statement. If we eliminate the statement, I would have to say I do recall speaking to Mr. Speece.

Q You recall the substance of your conversation now as you testified to on direct?

A Yes.

Q You are aware of the fact Mr. Speece died since the events to which you testified?

A I learned of that in the 1975 depositions, after some of these depositions had taken place or after the deposition or before or something.

Q In other words, you say it was during the depositions that you learned that Mr. Speece had died, is that correct?

A I don't know if it was in 1975. I think it was in 1976 deposition I learned it from Mr. Kaplan.

Q At the pretrial hearing you testified about your conversation with Mr.Di Simone. You testified as follows, reading from the preliminary hearing at page 442, line 21:

"A I believe at this time he" -- referring to Mr.Speece -- "told me to speak to Di Simone. Di simone I think was in charge of the fleet department, if I recall.

"Q I spoke to Di Simone about it and he gave me some highlights. We would have to get a dealer who would go along. They had a program and he described to me that the dealer would sell us cars with a guaranteed buy-back in six months for daily rental program that we would supply our brokers, and there was a two and a half per cent depreciation per month it was based on.

"At the end of the six months the dealer would buy the cars back. There was a guaranteed buy-back. You have to get a dealer to apply for it, he said, and if they wanted to do it -- Drury -- that is up to them. That was the extent of my conversation."

That is the conclusion of the reading from the preliminary hearing.

Now, Mr. Maiorana, you made no reference in your pretrial hearing to any comments by Mr. Di Simone concerning reselling, but at the trial you were asked on direct examination about your conversation with Mr. Di Simone, and you made the claim that Di Simone also said, reading from the trial transcript, "Well, we are not in the business of selling cars to people who are going to resell them."

Now, you ultimately submitted an affidavit for financing to GMAC on behalf of Nabcor, isn't that correct?

A Yes. You have gone on and on there.
3 There were three subjects.

Q I will repeat --

A There are about three questions there. We discussed here my discussion with Mr. Di Simone and what I didn't say --

THE COURT: Look, I think I laid this out, the rules that I proposed were the rules that Mr. Kleinbard is following.

I told him that he didn't have to go through the useless motion of asking you did you say this at the preliminary hearing, did you say this earlier in the trial. The record is down in black and white, and I told Mr. Kleinbard that he could simply summarize the salient points or read the salient points so long as he is fairly stating what is in the record and state this to the jury here and now and put it on the record.

Now, the question has come up, if you wish to explain any apparent inconsistencies or anything like that, you should have the opportunity to do so.

Is there anything you wish to explain, but I am not trying to open the door to a long speech about your grievances and so forth. Is there anything you wish to explain as to what Mr. Kleinbard is seeking to point out by way of inconsistencies?

THE WITNESS: Yes.

THE COURT: What?

THE WITNESS: First he pointed out that I was a little vague in my mind who I called first or not and there were about ten pages of this. They were asking the questions and in the manner they asked the questions --

THE COURT: You see, that is the danger of this. What are you talking about?

MR. PERSON: He is referring to the deposition or the hearing in question, I believe, your Honor.

THE COURT: But what subject? There were two points that Mr. Kleinbard was seeking to bring out.

One, in your deposition testimony about October, 1975, when you said at that time that you did not recall speaking to Speece,but you may have. I think you were asked about that, and you say now you recall it, so do you have any more to explain about that?

THE WITNESS: Yes, I recalled that at the time, too, but he is taking it out of context.

THE COURT: He is taking it out of context? Mr. Person, is he taking it out of context?

MR.PERSON: I don't have the transcript, your Honor. I can't tell.

THE COURT: It is your job to have the transcript and follow it.

MR. PERSON: It is a question of economics, your Honor.

THE COURT: It is not a question of economics. You have all the transcripts available to you that you need.

THE COURT: There is no correction on that based on that record, and I will assume that it is not taken out of context.

MR. PERSON: I will research it, and ask for the right to see whether or not I can show that it was out of context.

THE COURT: It is just a matter of looking at the transcript.

As far as the other thing Mr. Kleinbard brought out was the testimony at the preliminary hearing and the trial testimony on the subject of what you said to Di Simone, and in line with what what statement do you wish to make?

THE WITNESS: First, your Honor, the testimony at the pretrial hearing I said to Di Simone is -- what was the second part? I lost it, you went into three different things.

THE COURT: Mr. Kleinbard, just read it over.

MR.KLEINBARD: Page 452, beginning with line 21 of the preliminary hearing, October 12, 1976:

"I believe at that time he told me to speak to Di Simone. Di Simone, I think, was in charge of the fleet department, if I recall. That is what he said. I didn't meet either of these gentlemen.

"I spoke to Di Simone about it and he gave me some highlights. We would have to get a dealer to go along. They had a program that he described to me that the dealer would sell us the cars with a guranteed buy-back in six months for daily rental program that we would supply our brokers, and there was a 2-1/2 per cent depreciation per month it was based on.

"At the end of six months the dealer would buy the cars back, it was a guaranteed buy-back. To get a dealer to apply for it he said, and if they wanted to do it -- Drury -- that is up to them. That was the extent of my conversation on it. I believe I was in New York at the time."

Then I asked, "Is that the end of the conversation?"

THE COURT: "Is that the end of the conversation?"

THE WITNESS: "In substance, that is what his conversation was about."

Then I read from the trial testimony.

A He read a dash Drury and a dash and dash.

THE COURT: That is exactly the way it is in the transcript.

THE WITNESS: Something was stricken out there, something that --

THE COURT: No, apparently you inserted the word "Drury" in the middle of the sentence, and that is exactly the way it is transcribed.

Mr. Kleinbard, proceed.

MR. KLEINBARD: May I go on with my question, your Honor. I don't think I have to read what I read in terms of his conversation.

THE COURT: Mr. Maiorana says he does not recall what you are bringing out, so just go back to the trial testimony, and do it again.

MR. KLEINBARD: All right. I am reading from the testimony, line 19, page 451, and this is the conversation with Mr. Di Simone:

"He said, well, we are not in the business of selling cars to people who are going to resell them. Evidently you are going to put up a leasing company and you want a fleet certificate to buy automobiles. I don't know whether I can go along with that, but he wanted to set up a meeting with me."

THE WITNESS: Your Honor, my explanation is that it is not inconsistent with my testimony. I called Di Simone,I wanted to go over this business of qualifications for a fleet certificate. I told him that wasn't what Drury was suggesting. He was supposed to cut through the red tape.

THE COURT: This doesn't apply to the point Mr. Kleinbard is bringing out. Let us go ahead.

Q Now, the question I was about to ask you, Mr. Maiorana, you ultimately submitted an application for financing to GMAC on behalf of Nabcor, correct?

A Yes.

Q You did it through the Matt Slap Chevrolet dealer?

A Matt Slapp submitted the application.

Q On your behalf?

A Yes.

Q Was the application for a line of credit recommended to your knowledge by the GMAC Philadelphia branch?

A I don't recall that they recommended that application. I believe the application was recommended by the dealer, was requested by the dealer, I should say.

MR.KLEINBARD: Your Honor, I would like at this time to offer Defendants' Exhibit A, which is premarked, which is the application for a car fleet financing on behalf of Nabcor submitted by the dealer Matt Slap Chevrolet.

THE COURT: Any objection?

MR. PERSON: For what purpose at this point?

MR. KLEINBARD: To demonstrate that an application for financing was approved by the GMAC Philadelphia office.

MR. PERSON: Are you asking for the witness -- is this to be used in any way to connect it up with the witness?

MR. KLEINBARD: Yes, it is connected with his application.

THE COURT: Is there any objection to it?

MR. PERSON: No, your Honor.

THE COURT: Exhibit A is received.

(Defendants' Exhibit A received in evidence.)

MR. KLEINBARD: I would like just to point out two things about this exhibit to your Honor and ladies and gentlemen of the jury.

No. 1, if you turn to the reverse side, I believe you have a one-page copy, you will notice under branch comments and recommendations, Section 6, it says, "This account presents additional sales potential and we recommend proposal be accepted as submitted."

It is signed on behalf of GMAC Branch in Philadelphia by a man whose signature you may not be able to read, but it is Hank Thomas of GMAC, manager.

Also, I would like to point out on the first side of the exhibit you are holding, that the application sought a line of credit of something in excess of $66,000.

Q Mr. Maiorana, in connection with this application for GMAC financing, Nabcor asked to supply an audited financial statement?

A I never saw this application before.

THE COURT: All right, you are not answering the question. Read the question.

(Question read.)

A I recall that I was asked to supply a statement, personal statement.

Q Can you answer my question? Was Nabcor asked to give an audited financial statement in connection with this application? Yes or no, or you don't know.

A Not to my knowledge. We didn't have audited statements then.

Q You didn't have what?

A Audited statements then.

Q Now, whether Nabcorwas or was not asked to give an audited financial statement, were you asked to give a personal guarantee or a personal guarantor financial statement for submission to GMAC?

A Yes, I was asked to give a personal guarantee.

MR. KLEINBARD: Your Honor, I would like to offer Defendants' Exhibit WWW, which is the personal guarantee submitted by Mr. Maiorana to GMAC.

MR. PERSON: It is acceptable.

THE COURT: WWW is received.

x (Defendants' Exhibit WWW received in evidence.)

THE WITNESS: Could I make a comment on this, your Honor?

THE COURT: Let's wait for the question.

MR. KLEINBARD: This personal guarantor financial statement, ladies and gentlemen and your Honor, is as of February 14, 1968.

If you look under the assets column, it indicates total assets of $797,000, of which the witness's shares in Nabcor are valued at $650,000.

Q Mr. Maiorana, you did not own all the stock of Nabcor, did you?

A At the time I owned all of the stock of Nabcor.

Q I am sorry, I didn't hear your answer.

A At the time I believe I owned all of the stock of Nabcor, all in my name.

Q Your testimony is that your brother Anthony did not own any stock in Nabcor?

A I don't know whether it was issued to him or not at that time. I don't recall.

Q How many shares of stock did you own in Nabcor as of that time?

A I don't recall. There was a thousand shares issued and outstanding and they may have been all issued to me at that time.

There was a commitment to Anthony for a certain portion of those shares, and I don't know whether those shares had been issued to him as yet.

Q So you are uncertain as to whether the thousand shares were totally in your name or partially in your name and partially in your brother's name, is that correct?

A Yes. If there was any difference, it would have been a 100-share difference, that is all.

Q If Anthony's shares had been issued he would have owned 100 and you would have had 900?

A That's right. I believe that is the way it was.

MR. KLEINBARD: I earlier stated to the jury that your shares in Nabcor were valued at $650,000. I was reading the value of the total securities, other securities. Actually if you look at the lower right-hand corner, there are 1000 shares of Nabcor issued to Mr. Maiorana, and he asserts in this application he owned and were valued at $600,000. I call your attention to that.

MR. PERSON: I might point out that the offering circular that Mr. Kleinbard put in evidence describes when the transaction in question concerning the issuance of shares took place at page 19. It was in 1970. I participated in that.

THE COURT: What transaction is that? The jury doesn't have the offering circular.

MR. KLEINBARD: I merely asked the witness for his information. He gave it to me.

THE COURT: You'll have redirect, Mr. Person.

MR.KLEINBARD: I would like to offer MMM, which is Nabcor's financial statement put out by Mr. Isidore Gitler, dated April 9, 1968, and it reflects the financial status of Nabcor, Inc. as of the fiscal year ending January 31, 1968.

THE COURT: We have to be systematic in handling the original exhibits. The only thing the jury should have are copies. We don't want to have bunches of originals and copies mixed up.

Thank you.

MR. PERSON: I object to the introduction because I don't know for what purpose it's being used. I think it's being used to try to show the value of the stock and I don't think it does that.

THE COURT: The objection is relevant. I'll overrule that. It is received.

(Defendants' Exhibit MMM was received in evidence)

MR. KLEINBARD: I point out three things about this exhibit. The Nabcor financial as of January 31, 1968 precedes Mr. Maiorana's financial guarantor statement by just a few days, approximately a week.

If you will turn to page 2 of the financial statement you will see that almost at the bottom there is a net stockholder's deficit: total liabilities exceeded the assets and capital by $123,841.45.

Finally, if you look at the next page, which is Nabcor's statement of operations for the year ended January 31, 1968, which is a statement of its profit and loss, it had a net income, as of this report, for the entire year of $923.18.

THE WITNESS: I don't have a copy of that.

THE COURT: You should have one before you.

(Pause)

Q I would like to read from your testimony of two weeks ago at page 670 of the preliminary hearing:

"Q How did you place a value of $600,000 on your shares of stock in Nabcor which value was put in your financial guarantor statement?

"A It was just an arbitrary figure based on a system that could be extremely valuable. The Senate and Justice Department were involved in an investigation at that time and if we got relief from that that might be valuable. It was based on an arbitrary figure on the value of the stock."

The truth of the matter is that you submitted a false financial guarantor statement to GMAC; is that correct?

A It's not correct.

This requires explanation, your Honor, because it's confusing and misleading.

The application that was made by the dealer to GMAC was on February 26. My financial statement was dated almost two weeks before that, February 14.

The financial statement that Mr. Gitler made up for Nabcor, we got that on April 9, and on April 14 we could not possibly have known what was going to happen or what the figures were on April 9, and all of this is just misleading to the jury. I want to bring it out.

MR. KLEINBARD: Your Honor, I must say that I direct to the Court's attention and the jury's attention that at the time of February 14, the only other statement that Mr. Maiorana had in his possession concerning the financial condition of Nabcor was Defendants' Exhibit LLL, which has been previously admitted in evidence, and on page 4 --

THE COURT: What is LLL?

MR. KLEINBARD: That's the financial statement for the preceding fiscal year, January 32, 1967. That reflected a deficit of $126,000.

THE COURT: Proceed.

Q In any event, Mr. Maiorana, Nabcor, the corporation, did not send a financial statement, audited or otherwise, to GMAC, correct?

A I don't know. I don't recall. I never recall the request. I don't recall anything pertaining to this application on the 26th by the dealer. I was not aware of it.

Q Your answer is that you don't recall?

A That's right.

THE COURT: On this guarantor financial statement, is that your signature?

THE WITNESS: I believe that is, your

Honor.

THE COURT: You say you did not have the audited report for the year ended January 31, 1968, right?

THE WITNESS: Yes.

THE COURT: You didn't have it as of the time you signed that guarantor financial statement; is that correct?

THE WITNESS: That's right.

THE COURT: What figures did you have?

THE WITNESS: I had no figures. This was dated April 9, 1968.

THE COURT: The certificate of the accountant is dated April which you pointed out. My question is this: What figures did you have when you signed the guarantor financial statement of February 14?

THE WITNESS: This is my personal statement, your Honor. This is not a statement on Nabcor.

THE COURT: What figures did you have with respect to the value of Nabcor stated at $600,000?

THE WITNESS: I said it was just a statement based on the concept and the system which I just placed an arbitrary value on.

THE COURT: Are you answering that you had no figures?

A I had no figures, no.

MR. PERSON: Your Honor, I would like to point out that the figures in Exhibit MMM are not audited. It was unaudited financials, as per the April 9, 1968 letter.

THE COURT: I don't know that anybody said otherwise.

MR. PERSON: You had said "audited" several times. I wanted to point out it was not audited.

THE COURT: The jury has the letter of Isidore Gitler, April 9, 1968. They can draw their conclusion as to what thatis.

MR. KLEINBARD: I think,your Honor, both you and the jury have seen Defendants' Exhibit LLL, which gives --

MR. PERSON: I object. There is a summary going on. Mr. Kleinbard is trying to sum up at this moment, it sounds like.

THE COURT: Let's proceed. Put your next question.

Q Mr. Maiorana, you claim that you met with Mr. Karney, Mr. Fogg, and an unnamed GM person who appeared to you to be subordinate to Mr. Fogg; is that right?

A Yes.

Q You claim that the GM people asked you a lot of questions including how many cars Nabcor owned?

A Yes.

Q You claim that you told them it was quite clear that Nabcor didn't register any cars in its own name; correct?

A Yes.

Q One or more of these gentlemen responded to you by saying it was GM's policy that you had to have somewhere between 10 and 20 cars registered in the company's name as a prerequisite for the issuance of a fleet certificate; is that right?

A Are you reading from something?

Q I have reference to something, yes, but I'm really calling for your testimony.

A There was discussion along those lines, yes.

Q Did you say to them that you didn't care whether or not Nabcor got a certificate, a fleet certificate?

A Yes.

Q Did you claim that your real concern was your claim that GM personnel were interfering with Nabcor's sources of supply?

A Yes. It was their problem and they should correct it, whether they issued a fleet certificate or gave me a letter and sent a letter to all of their dealers instructing them in compliance with the Supreme Court decision that they were allowed to sell automobiles to us as a reseller of cars, or to any other independent for that matter.

THE COURT: This is what you said to Mr. Karney, Mr. Fogg and the other person?

THE WITNESS: Yes. I got a little bit annoyed, your Honor. I think it will show. I eventually walked out of the room because it sounded like a fishing expedition. They wanted to know the names of my suppliers, dealers who were supplying me with cars. I took that --

MR. KLEINBARD: I ask that the witness refrain from going on and on.

THE COURT: Let's ask a question, please.

Q Did Mr. Karney ask for specifics, such as the names of the Chevrolet personnel and the dealers involved and the dates and circumstances of the alleged incidents about which you were complaining to him?

A Yes. I believe I stated previously that on the way from my office to this meeting I brought to his attention the incident about English.

THE COURT: Mr. Maiorana, Mr. Kleinbard is asking the following question: Did Mr. Karney ask you for the particulars of the incidents you complained of in the way of names, dates, and circumstances? Did he ask you for such particulars?

Is that your question?

MR. KLEINBARD: Yes.

THE COURT: What is the answer?

THE WITNESS: Not in that way, your Honor. He did not ask me directly.

THE COURT: Did he ask you indirectly?

THE WINTESS: Yes.

THE COURT: What did he ask you?

THE WITNESS: I asked him whether Mr. Belcher had brought him up to date. He said, "I understand you have some problems."

I said, "Didn't Mr. Belcher explain to you the problems that we were having with the Buffalo zone and some of the personnel?"

He said "Well, he told me certain things, but some of the people -- he didn't tell me all of the situations. Maybe you could give me some highlights."

So I told him about the situation with Bob English and Don Bolling where Bob English had made that statement that any dealer selling cars to Nabcor would be cancelled.

I told him about Womack backing up that statement.

I told him the Owens' incident where he was threatened to be fired if he continued to be a Nabcor broker.

I related other things to him.

That was the substance. I related some of the events that had taken place and I also discussed, told him, that we had our own problems right here in the New York area last year.

Q Is this the information you gave him while you and he were crossing over from the General Motors Building, crossing the street, to meet Mr. Fogg and the other gentleman?

A Yes. Going from my office to the other office.

MR. KLEINBARD: May I have Plaintiffs' Exhibit 353 in evidence and Plaintiffs' Exhibit 356 in evidence.

(Pause)

MR. KLEINBARD: These are already in evidence, your Honor, and ladies and gentlemen of the jury.

The first of these two letters is a letter from Mr. Karney, 353, to Mr. Maiorana, and it's dated January 31, 1968. It asks for certain additional information in order to give consideration to the request for a fleet certificate.

I would like to direct your attention to the last paragraph in Mr. Karney's letter to Mr. Maiorana.

MR. PERSON: I object to that characterization as "Mr. Karney's letter." It was Mr. Olson's letter.

THE COURT: The exhibit is in evidence. Does the jury have copies?

MR. KLEINBARD: Yes.

THE COURT: I don't think we have to get into that now.

MR. KLEINBARD: "In your recent meeting with me you remarked that some Chevrolet representatives had sought to induce dealers not to sell cars to your company but you refused to rpovide any details in this connection although I asked you to do so. Any such conduct - as that intimated is contrary to General Motors policy, as I informed you. General Motors is not in a position to investigate the circumstances which you may have had in mind however unless you furnish requisite details such as names, persons, places, dates and other circumstances alleged involved. If you do not furnish such information it can only be concluded by us that there is no basis to support the conduct alleged."

Plaintiffs' Exhibit 356 is Mr. Maiorana's response to Mr. Karney's letter and it reads:

"I am sorry to receive the information in your letter dated January 31, 1968 in reference to obtaining a fleet certificate. I would like to call to your attention that the question of Nabcor obtaining a fleet certificate was the result of my conversation with Mr. Belcher. Mr. Belcher agreed with me that obtaining such a certificate might correct a situation created by the General Motors employees in the Buffalo area.

"It should be further pointed out that the original purpose of my discussion with Mr. Belcher was to correct the actions of the General Motors dealers in the Buffalo area from information supplied to me. It is my belief that these dealers were engaged in a concerted effort to prohibit sales to Nabcor distributors in this area and that this effort was initiated as a result of actions on the part of General Motors employees. It was this latter condition that I was trying to correct when I first spoke to Mr. Belcher.

"It seems apparent to me that individual names need not be supplied to you in order to correct this condition. If you feel you can proceed no further on the infomration that you now have, our distributors, dealers, and ourselves will have to seek other avenues."

I merely point out there is no mention in 356 to the effect that Mr. Maiorana had detailed to Mr. Karney the various things that he had just said --

THE COURT: Let's try not to argue.

MR. PERSON: May the witness respond to that, your Honor? May he respond --

THE COURT: You will have a chance to examine him.

I would like for Mr. Kleinbard to avoid this and we won't have to get into this problem.

BY MR. KLEINBARD:

Q Mr. Maiorana, on direct you testified

that you had a telephone conversation in January of 1967 with a Walter Englert of Midtown Chevrolet concerning the delivery of some ten cars; is that correct?

A Yes.

Q These cars had been ordered from Don Allen Chevrolet before Don Allen became a General Motors owned dealership, correct?

A Yes.

Q And it was Bud Morrison at Don Allen who had accepted your order for ten cars?

A Just a second now. What is the time frame you are speaking of?

Q I'll ask you that.

You originally placed this order with Don Allen Chevrolet, did you not?

A We originally contracted with Don Allen Chevrolet, that's correct.

Q The person you were dealing with at Don Allen Chevrolet when you contracted with them was Bud Morrison; is that right?

A Bud Morrison was the fleet manager at that time, that's right; however, he may have come with Nabcor prior to the takeover.

Q Prior to the takeover by General Motors?

A And Englert, who was his assistant, may have received some of these orders or processed some of these orders prior to the takeover by General Motors.

Q I think I have already mentioned it but I wantto make sure the record is clear: Bud Morrison did become a Nabcor employee, correct?

A Yes. About thattime, about the takeover, maybe a little bit before, probably a little after, Englert was his assistant.

Q In your initial discussion with Mr. Morrison, did you tell him Nabcor was in the business of reselling cars?

A Absolutely. He knew that.

Q Do you recall when you had your first conversation with Mr. Morrison with respect to his joining the Nabcor organization as an employee of Nabcor?

A I met him at a preview of the showing of the new Pontiacs, '67 Pontiac, at Ruckle's showroom, and that had to be around the early part of October. It was at that time that he agreed to sell us cars. We entered an oral contract --

Q Mr. Maiorana, I'm asking you if you can recall the first time you spoke to Mr. Morrison about his becoming a Nabcor employee. Can you just tell me that? Answer that question.

A Within days of our original meeting.

Q Within days of your original meeting?

A That's right. A week or so. He was very interested in our program.

Q By what time did youand Mr. Morrison reach the conclusion thathe would come with the Nabcor organization?

A In December.

Q I beg your pardon?

A In December.

Q Can you place the time in December at all?

A It was at the time of the takeover, give or take a day or two days or so, one way or the other.

THE COURT: Ladies and gentlemen, we'll have a longer recess for lunch, but I would appreciate going on without a recess, if you can all do that.

MR. KLEINBARD: May I have Plaintiffs' Exhibit 525, please.

Q You talked employment with Mr. Morrison within a few days of meeting him in October of 1966, correct?

A When you say "you talked," the conversation came up. I believe Mr. Morrison knew of the pending purchase of Don Allen Chevrolet by General Motors and he may have broached the subject.

Q Whoever broached the conversation, there was conversation?

A There was conversation, yes.

Q I show you Plaintiffs' Exhibit 525, which is dated November 2, 1966. I ask you if this is the letter agreement which you and Mr. Morrison entered into at that time between Don Allen, Midtown Chevrolet, and Nabcor, with respect to Don Allen's supplying Nabcor with new Chevrolets.

A Yes. This is the agreement.

Q So that this agreement which Nabcor and Don Allen entered into was entered into during the time that you were discussing employment with Mr. Morrison; is that correct?

A That's not correct.

Q Did you receive that agreement in the regular course of the mail?

A Yes.

Q I ask you to look at the envelope which contains that exhibit, Plaintiffs' Exhibit 525, and direct your attention to the fact that there is no stamp.

A It may have been handed to me.

MR. KLEINBARD: May I show this to your Honor and then have it shown to the jury?

THE COURT: Yes.

(Pause)

Q In your pretrial hearing, Mr. Maiorana, you were asked about your telephone conversation with Mr. Englert and at page 373 your counsel asked:

"Q What did you say to Mr. Englert?

"A I asked him why he would not give us the cars, he had these cars for about three weeks. I told him that he had those cars for three weeks. We had customers getting ready to cancel and why would he not give us those automobiles? Why hadn't he given us those automobiles?

"He said, 'Well, you are not going to get the automobiles. We are not selling them to you. My orders are that we are not -- we can't sell cars to Nabcor.'

"I said 'Why is that? These are not your cars. These cars were ordered prior to your taking over from Don Allen Chevrolet. We ordered these from Don Allen Chevrolet and since you purchased that agency you should honor the contract.'

"There was a discussion. He said, 'Well, I can't get into that. I am not going to sell you the cars, and that is it. If you want to talk to my boss I will have you talk to him."

There is no mention in that testimony that Mr. Englert at that time said anything about fleet certificates.

You were present in the courtroom when your counsel made his opening statement to the jury, were you not, Mr. Maiorana?

A I was.

Q You heard him tell this jury the following -- and I read from trial transcript page 27, lines 3 to 7:

"This fleet certificate is what the General Motors dealers were saying Nabcor had to have, otherwise they could not continue to deal with Nabcor, or they would not deal at all with Nabcor unless Nabcor had this fleet certificate."

And then when you testified before this jury, Mr. Maiorana, you said that Mr. Englert told you he would not give you cars --

THE COURT: What page?

MR. KLEINBARD: 274, your Honor.

THE COURT: Give me a moment.

(Pause)

Q When you testified before this jury, Mr. Maiorana, you said that Mr.Englert told you that he would not give you the cars because among other things, and I quote at line 10, "You don't have a fleet certificate."

And then the Court said, "Don't drop your voice."

And you answered again "You don't have a fleet certificate or fleet number."

You claimed that in your conversation with Mr. Englert he told you, "If you want I will let you speak to my boss," isn't that correct?

A No, that's not correct.

Q I read from your direct testimony at page 275, line 7:

"He said, 'I'm not going to give them to you' -- the them referring to the cars. I said, 'I want to talk to somebody higher than you, that is, your superior.'"

A That's correct.

Q "'These cars are our cars. They came in assigned to us. I want them.'

"He says, 'If you want I'll let you talk to my boss.'"

A That's correct.

That's not what you said the first time, Mr. Kleinbard. I wanted to correct the situation. I made the suggestion to talk to his superior..

MR. KLEINBARD: Everybody has heard what transpired here.

THE COURT: Next question.

Q You further claim, Mr. Maiorana, that within a few minutes another male voice spoke to you on the telephone, correct?

A Yes. Another individual which I assumed was a male, a male voice over the telephone.

Q You don't recall the voice's name, do you ?

A No, I don't recall the voice's name, Mr. Kleinbard.

Q In an affidavit filed with this Court on or about March 4, 1973, you described Midtown's alleged refusal to deal with Nabcor. That's at page 30 of the exhibit and subdivision 10. I'm just reading the text:

The name and address of the GM dealer,

Don Allen, Inc., which became Midtown division of GM in 12/66, and the only textual description of any conversations I read as follows:

Fleet manager Bob Englert told Frank Maiorana and Nabcor's Ed O'Brien and Allen Dennison that his boss, a GM executive, told him not to sell cars to Nabcor, even ones ordered by Nabcor through predecessor corporation.

Midtown division delivered cars previously ordered by Nabcor but refused to accept any other orders because Nabcor was competing with dealers and dealers had complained.

That affidavit makes no mention of any conversation between Mr. Maiorana and anyone at Midtown other than Mr. Englert.

MR. PERSON: Are you asking him a question?

MR. KLEINBARD: I'm making a comment with respect to the affidavit that he has already --

MR. PERSON: Your Honor --

MR. KLEINBARD: As I understand his Honor's ruling, I am entitled to comment on it.

MR. PERSON: It seems to me there should be a chance to respond.

MR. KLEINBARD: He has redirect, your

Honor.

THE COURT: I have given him the chance to explain. Do you wish an explanation?

THEWITNESS: I would like to have an explanation.

There have been four different times. I was deposed extensively in 1973. I have tried to summarize these things in substance what these conversations were about, and right here in this court. I believe when I tried to give the highlights -- after all, these conversations took place --

THE COURT: I want to correct that. You stated earlier that your adding additional points was in response to my request and that referred to the conversation with Mr. Belcher. You were incorrect in that. The adding of additional points came in response to your lawyer's questions. I would like that corrected right now, and I should have the other day.

Do you have any other explanation that you wish to give?

MR. PERSON: I don't think he's finished with his explanation.

THE COURT: He can finish.

THE WITNESS: The point I was trying to

make, your Honor, and I'm sorry if I -- the point is that I tried to summarize these things. There were things that were left out. It's according to how the question was asked and who asked it and what they were trying to bring out.

In 1973 I remember that there was a lot of animosity and threats about how I tried, when I tried to explain and add some things to explain the situation, I was threatened with being drug into this court and dire consequences that would take place.

MR. KLEINBARD: I move to strike that testimony.

THE WITNESS: If I summarized something and now he's taking this out of context, there may be other situations where I explained that, that same deposition, your Honor, in the same period. I think I have been consistent in stating that I spoke to Mr. Englert and I insisted on speaking to his superior.

I think you will find this all through my testimony in all of the depositions that were taken, including the pretrial -- the evidentiary hearing we had here and this particular hearing.

This is what I wanted to explain.

THE COURT: All right.

Next question.

(Continued on next page)

T4

Q Perhaps you can direct our attention to where you pointed it out in the pretrial hearing when you testify again.

In the meantime, Mr. Maiorana, you mentioned that a lot of animosity and differences, et cetera, and you pointed out in this affidavit prepared presumably between you and your attorney and signed by you, that nobody else had participated --

MR. PERSON: Why don't you ask him who prepared it?

Q Who prepared it?

A My counsel.

Q All right. You signed it?

A Yes.

Q You swore that it was true?

A That is true to the extent that it was --

THE COURT: Let's not have any -- this is an affidavit and the jury understands what an affidavit is. Next question.

Q During the period of this litigation I think we have had testimony that you have been in communication with various officials in the Department of Justice and elsewhere and one such communication was a letter that you wrote to Mr. Robert Weinbaum on or about February 19, 1968, is that correct?

A I would like to see the letter.

Q I beg your pardon?

A You are making a statement. I would like to see the letter.

Q Let me ask you first as a matter of recollection, do you recall writing a letter describing Nabcor's difficulties to Mr. Weinbaum?

A I recall writing many letters and having many telephone conversations before he was employed by General Motors --

MR. KLEINBARD: I move to strike.

THE COURT: It is stricken. Let's answer the question.

Q Can you give me an answer? If you remember, fine. If you don't remember, also fine. Just tell me --

MR. PERSON: He wrote many letters. Can you show him the letter?

MR. KLEINBARD: I would like to ask the witness's memory for a moment.

THE COURT: There is no reason for any of this. Just answer the question.

A I believe I wrote. I don't recall specirically. I remember I wrote letters.

THE COURT: That is an answer. Next question.

Q Now, I show you Defendants' Exhibit PPP for identification, which is a letter dated February 19, 1968, addressed to Robert C. Weinbaum, and I represent that it is annexed to your affidavit in support of the motion for a preliminary injunction.

THE COURT: Just show it and see if he remembers it.

(Handed to witness.)

A It is a very lengthy letter, your Honor. I have not read through it. I will say that I probably wrote a letter or many letters like this to the Justice Department. This is one of them.

THE COURT: Are you offering it?

MR. KLEINBARD: No, I am not.

MR. PERSON: I would like to offer the letter.

MR. KLEINBARD: Mr. Person may make any offer he wishes.

THE COURT: You are offering what, Mr. Kleinbard?

MR. KLEINBARD: I would like to make a limited offer of a few lines on page 2 which refer to Mr. Maiorana's problems with the Don Allen organization when it was taken over by Mid-Town Chevrolet.

THE COURT: Can I see it?

MR. KLEINBARD: Surely.

MR. PERSON: I object to any kind of limited offer. I would like the whole document in evidence, your Honor.

MR. KLEINBARD: This is my own copy, your Honor, and I have it bracketed.

THE COURT: I will receive that portion, and that is as far as we go right now.

MR. KLEINBARD: The portion to which I refer is:

"When General Motors took over the Don Allen organization at 57th Street and Broadway in New York City, a new man took over as fleet manager of what was now Mid-Town Chevrolet and was owned by General Motors.

"Immediately he refused to honor orders that we had previously placed with Don Allen Chevrolet and were waiting for delivery. After several conversations with the fleet manager of Mid-Town Chevrolet in which I myself participated, he agreed to deliver only those cars which we had ordered through the Don Allen organization. He refused to take any more orders or to sell us any more cars."

Q Now, in February of 1968 your recollection of the events of January of 1967 was fresher in your mind, was it not, Mr. Maiorana?

A Yes.

Q Now, in any event, Mr. Maiorana, it ended up by Mr. Englert agreeing to sell Nabcor cars at the price set forth in Bud Morrison's letter after some initial confusion about the terms of the agreement with Don Allen Chevrolet; isn't that right?

A I don't recall any confusion with the terms in the agreement.

Q You say you don't recall it?

THE COURT: He didn't say that.

MR. PERSON: Have you finished your answer?

THE WITNESS: Yes.

THE COURT: It is a very complicated question.

MR. KLEINBARD: I will make it a simpler question, your Honor.

Q Did Englert agree to sell Nabcor the cars at the price set forth in Mr. Bud Morrison's letter?

A If that is what you are referring to, there was a point, if I recall vaguely, that he tried to increase the price.

Q All right. Did he ultimately agree to sell them to you at the price set forth by Bud Morrison?

A Yes.

Q Now, in January of 1967, in addition to Bud Morrison, Nabcor had employees named Bill Vass?

A. Yes.

Q Norman Weinberg?

A Weinberg, yes.

Q And Ed O'Brien?

A Yes.

Q And in January of 1967, you, Morrison, Vass, Weinberg and O'Brien all gave instructions to Mid-Town regarding these orders, is that correct?

A Could you read that back to me, Mr. Reporter, please?

(Question read.)

A That is not entirely correct, Mr. Kleinbard.

I got into it only after there was an absolute refusal to give us the cars, and it was brought to my attention and I got into it at that time.

They have been, Mr. Morrison had been involved prior to my getting involved.

Mr. O'Brien may have, and I don't know whether Mr. Vass -- in fact, I don't believe Mr. Vass --

he may have been involved in it. There were other employees involved in trying to get these cars, yes. I was the last one to get involved.

Q Without giving me the chronology of which employees got involved when, would you be good enough now to tell me did the Nabcor employees who spoke to Mid-Town concerning these orders in January of 1967 --

A They spoke to them in December of 1967 also.

Q All right. Give me the various Nabcor employees who spoke to Don Allen Chevrolet concerning these 10 cars.

A If I recall correctly, Bud Morrison and Ed O'Brien informed me that --

Q May I have a list of the names, Mr. Maiorana? That is all I am asking.

THE COURT: Who spoke, to your knowledge, to Mid-Town about these cars?

THE WITNESS: As I recall now, Bud Morrison did, Ed O'Brien did.

THE COURT: Did Weinberg?

THE WITNESS: That is possible, your Honor.

THE COURT: And you?

THE WITNESS: Yes, I definitely spoke, yes.

Q Anybody else? You gave us a list earlier, you said there may have been other employees who spoke?

A That's right.

Q Any others that you can recall?

A No.

Q Is it correct that all of these people that you mentioned gave Mid-Town the same instructions with respect to these orders?

A What do you mean by instructions, Mr. Kleinbard?

2

Q Well, I mean by instructions, did they all ask Mid-Town to deliver these 10 cars, not to deliver these 10 cars? That is what I call an instruction. To hold up some of the cars, to do something with some of the cars?

A When these cars came in --

Q I am just asking whether they all gave the same instructions to Mid-Town?

A They asked delivery of these automobiles.

Q All of them?

A Using my own terminology. You can use your own, Mr. Kleinbard.

Q But it is your testimony that they all requested delivery of the automobiles?

A That's right.

Q And the bottom line, Mr. Maiorana, was that Nabcor purchased two cars and cancelled eight, is that right?

A Yes. Some of our customers cancelled and --

Q You say yes?

A Yes.

Q Now, the entire time span from when you first spoke to Mr. Englert until Mr. O'Brien confirmed the cancellation of eight orders was about two weeks, isn't that right?

A I don't recall that. You are saying -- can you give me that question again, please? You brought Mr. O'Brien into this thing.

THE COURT: Whenever you --

MR. KLEINBARD: I am almost finished, your Honor.

(Question read.)

A I don't recall.

Q I read from Mr. Maiorana's testimony at the trial on direct, page 273:

"Q Did you communicate with anyone at Mid-Town Chevrolet concerning these automobiles that were ordered by Nabcor?

"A Yes.

"Q When did you communicate with somebody?

"A In January, the early part of January.

"Q Who is it that you spoke with?

"A Bob Englert."

MR. KLEINBARD: Now, I would like at this time to mark and offer Defendants' Exhibit P, Mr. O'Brien's letter of January 18, 1976.

That will conclude this line, your Honor.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: All right, Exhibit P is received.

xx (Defendants' Exhibit P received in evidence.)

MR. KLEINBARD: Your Honor, and ladies and gentlemen, you have the exhibit in front of you. It is a short letter from Mr. O'Brien of Nabcor to Mr. Englert and I just call your attention to the last paragraph, they have cancelled the order and he says, "Thank you for the cooperation that you and your department have given us in this and our previous business transactions."

THE COURT: All right, 2 o'clock, please.

(Luncheon recess to 2.00 P.M.)

FRANK MAIORANA, resumed.

CROSS EXAMINATION CONTINUED

BY MR. KLEINBARD:

Q Mr. Maiorana, I show you Defendants' Exhibit J-6, which is a book of master distributor agreements executed between October 6, 1967, and July 3, 1968. It includes Defendants' Exhibit Y, which was shown to you yesterday.

Each of them are on a form, Nabcor form, called NADFA 5-6-73.

When you have had a chance to look at it, please let me know.

THE COURT: Let's ask your questions, because I am sure you don't want him to look through all these right now.

Q What I would like you to tell me, Mr. Maiorana, is whether these are not all franchise agreements that Nabcor executed with its master brokers?

THE COURT: We will take your say-so.

MR. KLEINBARD: I would like to offer the book in evidence.

MR. PERSON: May I see it?

I would like to ask a question about that.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR.PERSON:

Q Did you have more than one form of Nabcor franchise agreements?

A Yes. These are not master franchise agreements.

Q Can you state what that agreement is, if you look at it?

A It maybe -- these are the original master distributor agreements.

Q Was this the master broker?

A I would have to read it over. Master broker, yes.

Q Did you have any other form than that during the period October 6, 1967, through July 3,1968?

A Not that I can recall.

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit J-6 received in evidence.)

Q Mr. Maiorana, I am going to ask my associate to show you Defendants' Exhibit G6,a book containing two master distributor agreements executed on November 26, 1968 and the other on May 5, 1969. Each of these is on Nabcor form NMDFA-7-686.

THE COURT: Are you offering these?

MR. KLEINBARD: Yes.

THE COURT: I see no reason to spend time. I assume these come out of the Nabcor file.

MR. PERSON: We have no objection.

THE COURT: It will be received.

(Defendants' Exhibit G6 was received in evidence)

MR. KLEINBARD: I have read paragraph 4, it's identical.

I will read paragraph 16 on G6.

(Mr.Kleinbard read to the jury from Defendants' Exhibit G6 in evidence)

Q Mr. Maiorana, you sold a total of approxiately nine master broker franchises; is that correct?

A Yes.

Excuse me. Did you say training manuals? I want to make sure of this. I have training materials on mine.

Q I said training materials.

A I thought you said manuals. All right. I wanted to make sure we were both reading the same thing.

Q In any event, I believe you said you did sell approximately nine master broker franchises?

A Yes.

MR. KLEINBARD: If I may follow the same procedure we have followed with the others I could save time.

I would like to offer in evidence H6.

THE COURT: What is that?

MR. KLEINBARD: It contains three area distributor agreements executed between September 19, 1969 and it includes C7, which was the agreement that I introduced in evidence yesterday. Each is on a Nabcor form, M-NADFA-7687.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit H6 was received in evidence)

xxx

MR. KLEINBARD: Finally I offer Defendants' Exhibit I-6, which is a book containing nine area

Q I said training materials.

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THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit H6 was received in evidence)

MR. KLEINBARD: Finally I offer Defendants' Exhibit I-6, which is a book containing nine area distributor agreements executed between January 21, 1969 and March 31, 1970, and each is on a Nabcor form marked NADFA-7-688.

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit I-6 was received in evidence)

MR. KLEINBARD: Paragraph 8, which I am going to read, is identical to defendant H6 and I-6. I am reading Paragraph 8.

(Mr. Kleinbard read to the jury from Defendants' Exhibit I-6 in evidence)

Q At the pretrial hearing you mentioned a meeting that you had with Walter Gray at the Westchester Townhouse. At page 490 your counsel asked the following question:

"Q Was anything else said at that meeting with Mr. Gray?"

And you concluded.

"A That was the substance of what the conversation was all about."

I'm stating, your Honor, in that answer -- I'm trying not to take the time to read it --

THE COURT: You referred to what? The

preliminary hearing? You will have to do that over again.

MR. KLEINBARD: Page 490, line 2. This begins:

"Q Was anything else said at that meeting with Mr. Gray?

The meeting was a meeting with Messrs. Holzworth, I think, and he had been describing an earlier meeting and then he got into the Gray meeting. At page 490 he was asked "Was anytning else said at that meeting with Mr. Gray?"

And he gives us his conversation as to what is supposed to have taken place, his conversation with Mr. Gray, 490 and 491, and at 492 he concludes on line 12:

"That was the substance of what the conversation was about."

I merely wanted to say that in that testimony he didnot say thathe told Mr.Gray that two of Nabcor's sources of cars were Don Allen Chevrolet and Luby Chevrolet. I think that's a fair characterization.

Q You heard your attorney say in his opening statement the following:

"During this conversation with Mr. Gray Mr. Maiorana told Mr. Gray that Nabcor was obtaining

Chevrolets from Luby Chevrolet out in Queens and Don Allen Chevrolet located in Manhattan."

That appears at page 39 of the trial transcript.

After hearing your attorney's opening statement you testified before this Court and jury about your meeting with Mr. Gray and this time, at 211 of the trial transcript, you included in your conversation with Mr. Gray references to Luby Chevrolet--

THE COURT: Read those.

MR. KLEINBARD: I will, your Honor.

"Mr. Kleinbard: Did the names of any specific dealers arise during the course of your conversation with Mr. Gray?

"A I believe Ruckle Pontiac was mentioned and Don Allen Chevrolet was mentioned, Luby, and maybe some others."

I think we have marked a portion of Mr. Maiorana's letter to Mr. Weinbaum dated February 19, 1968. It was marked PPP. I would like to offer the last 11 lines on page 2and the first two lines on page 3 of that letter insofar as they relate to Mr. Maiorana's account of his conversation with MR. Gray.

THE COURT: May I see that?

(Pause)

MR. PERSON: We would like the whole document in once again.

(Pause)

THE COURT: Are you looking at this?

MR. PERSON: Yes.

THE COURT: You object to it?

MR. PERSON: Because --

THE COURT: Do you object to any other grounds other than you want the whole letter?

MR. PERSON: Well, your Honor --

THE COURT: I will sustain the objection.

Next question.

(Pause)

MR. KLEINBARD: I am having difficulty with the basis on which you sustained the objection. May I approach the bench?

THE COURT: It's not that important. It's contradictory. Please, let's go on.

MR. KLEINBARD: All right.

Q Mr. Maiorana, when you testified on direct I believe you referred to the fact that in the early part of 1969 Nabcor ordered a truck from Queen City

Chevrolet in Cincinnati, Ohio?

A Yes.

Q You claimed that after it arrived at Queen City Chevrolet Nabcor was refused delivery of the truck?

A Yes.

Q And ultimately the truck was delivered?

A Yes.

Q The whole time span between your claim that the dealer refused to deliver the truck and the timewhen it was released to Nabcor's broker in Cincinnati was a matter of three or four days, right?

A I don't know whether I said that.

Q I beg your pardon?

THE COURT: He's asking whether that is a fact.

A It might have been three or four days, a day longer.

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Q We are talking about three or four, maybe five days, something like that.

A Yes.

Q And the Chevrolet zone for Cincinnati is located, to your knowledge, in Cincinnati?

A I don't know where the Chevrolet zone is located in Ohio.

Q Is it located in Ohio, as far as you know?

A I don't know.

Q You believe it to be located in New York?

A I don't believe it to be in New York, but I would say that you people would know better where your zones are located.

THE COURT: What zone are you talking about?

MR. KLEINBARD: For Cincinnati, your Honor.

THE COURT: I take it you don't know where it is located?

THE WITNESS: I wouldn't know.

THE COURT: That is the answer.

Q You claim that you telephoned Jack Douglas of the New York Chevrolet zone in connection with this transaction?

A Yes.

Q And made that call from your office in Jenkintown, Pennsylvania?

A I don't recall whether it was Jenkintown or not.

Q At page 505 of the preliminary hearing you stated that you did make it from Jenkintown?

A It is possible.

Q In the deposition on May 5, 1976, at page 2560:

"Q Do you have a picture in your mind of the fact that you made a telephone call to the man in New York?

"A Absolutely, yes.

"Q Do you remember where you were sitting?

"A I believe in my office in Jenkintown. Jack Douglas is the man I spoke to in New York and he was zone fleet manager."

MR. KLEINBARD: I would like to offer at this time Defendants' Exhibit GGGG, a copy of a letter from Mr. Snyder of Nabcor to a Nabcor broker, Nabcor of Southern Ohio, dated March 10, 1969.

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit GGGG received in evidence.)

MR. KLEINBARD: I would also like to offer

Defendants' Exhibit VV, and this is an invoice from Queen City Chevrolet to Nabcor for the truck in question dated March 11, 1969.

MR. PERSON: No objection, your Honor.

THE COURT: Received.

xx (Defendants' Exhibit VV for identification received in evidence.)

MR. KLEINBARD: I would also like to offer Defendants' Exhibit V, which is a New York State Department of Motor Vehicle Form MV50 relating to this truck.

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit V received in evidence.)

MR. KLEINBARD: Your Honor and ladies and gentlemen, I dislike to mention what these exhibits are because there are not enough copies to go around. They are very short and I can read them.

First is a letter from Mr. Snyder of Nabcor to Nabcor of Southern Ohio, dated March 10, 1969.

(Exhibit read.)

The second item is an invoice from Queen City Chevrolet to Nabcor dated the next day, March 11,1969, for the truck in question.

And the third exhibit is the State of New York Department of Motor Vehicles, transferring title to the car to Nabcor.

MR. PERSON: Actually a form,if you read it. Who signed it?

MR.KLEINBARD: Mr. Turco signed it.

MR. PERSON: A plaintiff in this action.

MR. KLEINBARD: Yes, and a Nabcor distributor.

These three documents show that the truck in question was --

THE COURT: This is argument. They know what an invoice is.

Q On your direct examination here at page 554, lines 9 through 20, you testified:

"Q Subsequent to the telephone conversation you had with Mr. Douglas did Nabcor receive any of the vehicles ordered at Queen City Chevrolet?

"The Court: Wait a minute. You said, I thought, that two cars were received?

"The Witness: Yes.

"The Court: I was under the impression that those were received before your communication with Jack Douglas. Am I wrong?

"The Witness: I believe they were received before my communication with Jack Douglas."

Q The fact is that Nabcor received two cars from Queen City Chevrolet after you claim you spoke to Douglas and after you received the truck in question, isn't that right?

A I don't think so.

MR. KLEINBARD: I would like to offer at this time Defendants' Exhibits TT and UU.

THE COURT: Will you read Mr. Kleinbard's last question and the answer?

(Record read.)

THE COURT: You are offering TT and UU?

MR. KLEINBARD: That is correct.

THE COURT: Mr. Maiorana would like to hear the question again. You received these exhibits?

THE WITNESS: Yes, I have them.

THE COURT: Let's have the question and answer once more.

(Record read.)

MR. KLEINBARD: Defendants' Exhibit UU is an invoice from Queen City Chevrolet to Nabcor at its Yonkers address and is dated 3/24/69, and Defendants'

Exhibit TT is an invoice from Queen City Chevrolet to Nabcor at the same address dated April 30, 1969.

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibits TT and UU received in evidence.)

Q Mr. Maiorana, you claim you had several telephone conversations with Mr. Lowe and Mr. Callan concerning the Askew Corvette, right?

A We didn't finish the last one. That was a truck on April 30, Mr. Kleinbard. I think there is confusion again. That was a truck that was delivered on April 30, a Chevrolet El Camino, which is a truck.

2 THE COURT: Mr. Maiorana is going back to the Queen City thing and he is referring to what exhibit?

THE WITNESS: TT is a truck.

THE COURT: All right.

THE WITNESS: And El Camino is an extremely expensive truck, I might add, and one that the dealer certainly didn't want to stock.

THE COURT: Who didn't want to stock?

THE WITNESS: Queen City Chevrolet. If you notice, what Mr. Kleinbard puts into evidence as the truck was another truck. The previous to that was a pick-up, which was $2600, a cheap truck.

THE COURT: Let's get back on the track. Do you want to ask him about this transaction?

MR. KLEINBARD: I don't want to ask him about it, but I will accept his characterization that Defendants' Exhibit TT is a truck.

My only point is that two vehicles, if you want to call it, instead of two cars, were delivered to Queen City after the original truck.

THE COURT: After the truck referred to in the documents of March 10 and March 11. Everybody knows that there is a difference between three different dates. I don't know why we have to pause on that. Next question.

MR. KLEINBARD: Would you read my previous question with respect to Mr. Lowe?

(Question read.)

A Yes.

Q You claim you spoke to Mr. Lowe before you spoke to Mr. Callan, is that correct?

A I believe so.

Q During your direct examination you gave the following testimony --

THE COURT: What is the reference?

MR. KLEINBARD: Page 569, line 21.

"Q Well, do you know approximately what date you talked with Mr. Lowe for the first time?

"A Oh, it was probably a month after or more after that letter.

"Q So approximately what?

"A Approximately a month after that letter came in.

"Q In June of 1969?

"A Yes."

In your pretrial brief which you have adopted the first conversation with Mr. Lowe to which you refer is one which took place on July 31, 1969. That's at page 91 of the pretrial brief. At that time it stated in the brief:

"On July 31, 1969 Lowe told FM,"referring to Mr.Maiorana,"that he had spoken with Wright"-- about the first quarter of the page down.

So that your first conversation with Mr. Lowe, Mr. Maiorana, took place on July 31; did it not?

A You are reading from transcript and the pretrial brief. Mr. Person prepared the pretrial brief. The statements that I made in there are correct.

As far as pinning me down to exact dates, there are documents that refer to these exact dates. I can't give you the exact date in time just out of memory.

Q I understand what you are saying. All I'm saying is that --

A These are approximate days I gave. You are saying that that was the first conversation, and I'm not agreeing that that was the first conversation.

Q Are you now saying you do not adopt the statement in the pretrial brief that on July 31, 1969, Lowe told you he spoke to Wright?

THE COURT: He's saying these are approximations.

MR. KLEINBARD: I think it's important as to what date we start with.

THE COURT: Do you have a memory or are these approximations? I don't know whether that was the first conversation I had with Mr. Lowe.

MR. KLEINBARD: I direct your attention to page 640, 641 of the pretrial hearings where

Mr. Maiorana was asked the same question, his conversation with Mr. Lowe took place on July 31, and he said "It's possible. If that is what is said there, it's possible."

THE COURT: Fine.

Q Mr. Lowe was located at the Chevrolet regional office in Chevy Chase, Maryland, was he not?

A I would say that that is within the information of General Motors. I believe he was in Chevy Chase, Maryland. I believe I stated -- if you will read that -- that he was in the Washington area.

Q Chevy Chase is in that area, is it not, it's a suburb of Washington?

A I stated the Washington area. If he was in that office he was in that office. There are maybe other offices in Washington and around that area. I believe he was in Chevy Chase. It's possible he might have been in another office. You people would know that better than I do.

Q You are not disagreeing that he was not in the Chevy Chase office?

A I said he was in the Washington area in my testimony.

pgr4 F.Maiorana-cross

testimony.

THE COURT: I'm afraid we'll have to break now.

Would you come to a stopping point?

MR.KLEINBARD: This is as good as any.

I'll keep the lawyers a minute and we'll adjourn until 10 o'clock Monday.

(Jury leaves the courtroom)

THE COURT: Sunday I can offer you morning or late afternoon and evening.

MR. PERSON: The latter.

MR. KLEINBARD: I would concur in that. I have to come in fromthe suburbs.

May we have a reporter? I don't want to rely on our right to have one but I know we have a right to have one there. I think it would be advisable to have one there.

THE COURT: I had not really covered that. The reporters are subject to a lot of strains. I think that there may be material which should be taken down. On the other hand, I'm not sure all of it is necessary. I wonder this, if we could not do it this way: Have a stenographer from one of the law firms available to take down anything that

pgr5

is actually firmed up. I have not asked the reporter. I don't like to.

MR. KLEINBARD: We would be happy to communicate with them and, fine, if there is a reporter available we would want one.

THE COURT: I think it's advisable but I have to say that --

MR. KLEINBARD: We would want a full record of it. Let's explore it.

THE COURT: To the extent I thought about it at all and I was trying not to think about it -- frankly, I was thinking that it being Sunday and a very unusual time to be down here, and we are doing this under kind of extraordinary circumstances; I really didn't think of an official reporter and I thought perhaps we could make do if there is a very fast letter stenographer from a law firm.

MR. KLEINBARD: It's immaterial to me as long as we have a full transcript whether it be a stenographer from our firm or a court reporter as long as Mr. Person has no objection .

THE COURT: Iiwill leave it to you to make the arrangements but I must say I would go easy on the court reporter. If they want to, if it means

pgr6

a little extra money --

MR. KLEINBARD: You have no objection to our producing one?

THE COURT: Whatever arrangements you make.

MR. KAPLAN: May we put one stipulation on the record which Mr. Person and I arrived at? It is to the effe c t that Mr. Person who just identified all sorts of experts will respond to interrogatory No. 64, our third set of interrogatories, which asks for information about experts, and I would like the Court to six a time to do that.

MR. PERSON: He's asking for all the factual bases plus all the conclusions of the experts. I need some time to put that together.

THE COURT: I think one of the things we are going to talkabout Sunday is all these experts. This, I assume, relates to the damage claim. The question is really going to be, what is there for the expert to talk about? That depends upon the factual case and I have not heard a glimmer of that so far.

The whole question of how many experts are going to testify at this trial as far as I'm concerned is just -- I'm not attempting to rule. I certainly am going to keep a rein on that. I think it would be

pgr7

rather useless to spend the weekend figuring out what the experts are going to testify about. The main thing for you to do is to get very specific on your factual damage claim, get very specific on how you calculate, and think that through.

It would also seem to me that it would be visible for you sometime before Sunday to apprise Mr. Kleinbard and Mr. Kaplan of what your thinking is. This is not going to be a session recorded but I think that we're arriving at a very serious point on this damage.

The damages are crucial. They're crucial as far as proof, they're crucial as far as any possibility of settling this case, and they're crucial to get a realistic assessment of what this case is worth.

There are two sides to any damage claim and I want you to have exchanged phone numbers so you can talk together, and I want you well in advance of Sunday evening -- and that means at least by midday Saturday -- to telephone either Mr. Kleinbard or Mr. Kaplan, whoever is designated, and I want you to describe to him what you intend to show. I think that should be possible.

pgr8

I know it's not in writing. I don't expect the telephone conversation to be taped or any of that stuff, but I'm sure that you can coherently describe your damage claim. You can be on the phone. If you are on the phone an hour or so it's well worth it, I mean, stating who will testify, what evidence you are going to put forth about the activities of what brokers and what that ev idence is, what kind of office they had, when they were in business, the dates they were in business, what did they do, what was their activity, did they call on customers, did they mail out, did they advertise?

Was this their sole occupation or was it part time? Were they students or gasoline station operators or what? How many orders did they receive? What did they do with those orders and what happened to those orders?

As far as Nabcor and any of the plaintiffs are concerned, who were on a different echelon than the brokers, the important thing is, I don't know what the question is about Nabcor, but you can exchange -- this is a point when you have groups of attorneys who simply have to exchange their questions and comments to each other.

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I think at the heart of it is the brokers. The brokers were out there supposedly getting the business. What was going on as far as auto business, I assume, from what I have heard, was the brokers. Nabcor was simply a party that was supposed to assist in getting cars.

As far as the profit from selling franchises -- I don't know all the answers, but that's the kind of thing that has to be buttoned down. What was Nabcor doing to sell franchises? How many people were interested? How many people were sold? How many franchises were sold? How many people filed suit? How many people were complaining about problems and so forth?

So let's get into that.

MR. KLEINBARD: What time are we invited to meet on Sunday?

THE COURT: I'm happy you used that word "invited."

I would say 5 o'clock would be better than 4 o'clock.

MR. KLEINBARD: No objection.

THE COURT: Same room.

(Adjourned at 3:10 p.m.)

NATIONAL AUTO BROKERS CORP., et al.

v. 70 Civ. 5 421A

GENERAL MOTORS CORPORATION, et al.

November 7, 1976
5:30 p.m.

(Trial resumed)

(In open court)

THE COURT: Mr. Person, I think the best way to start is to get the general elements of your damage claim and then we do want to get very specific. What are the elements?

MR. PERSON: Nabcor capital contribution, 27,000 -- or you just want the elements and not the figures?

THE COURT: Well, no, let's have the elements and the figures. Nabcor damage claim, you mean a claim on behalf of Nabcor of a capital contribution to whom?

MR. PERSON: To Nabcor itself.

THE COURT: By whom?

MR. PERSON: By Frank Maiorana.

THE COURT: So he is making personally --

MR. PERSON: This is a General Motors -- I am sorry, this is a Nabcor loss. That is a loss to Nabcor of

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the amount of the capital contribution.

THE COURT: All right. The amount of the capital contribution received from Frank Maiorana.

MR. PERSON: Right.

THE COURT: And that is $27,000.

MR. PERSON: Correct.

The actual franchise income from 1967 to 1970, less expenses, 485,538.

THE COURT: 1967 through '70.

MR. PERSON: Yes.

THE COURT: $485,000.

MR. KAPLAN: Could I just make sure I understand what you told me on the telephone about that? That is money you actually made, that is profit to Nabcor that you are claiming again, right?

THE COURT: Let's not argue it at this point. Let's just try to get the elements from Mr. Person.

What are the other elements?

MR. PERSON: Loss of franchise sales from '67 through '70, less expenses.

THE COURT: What is that?

MR. PERSON: 9,114,462.

THE COURT: All right.

MR. PERSON: Loss of franchise royalty income on car sales by existing brokers from '67 through '70.

THE COURT: Loss of franchise royalty income -- what was the rest of that?

MR. PERSON: On car sales by existing brokers, 1967 through '70, and that is less allocable expenses.

THE COURT: What is the amount?

MR. PERSON: 4,000,917.

THE COURT: All right.

MR. PERSON: And loss of the same income on sales by brokers that were not in existence.

THE COURT: On potential brokers?

MR. PERSON: Potential brokers.

THE COURT: Okay.

MR. PERSON: That is $20,000,000, same period.

THE COURT: All right.

Next.

MR. PERSON: Loss of gross profits on direct sales by Nabcor.

THE COURT: Do you have a writeup of this?

MR. KLEINBARD: I have a copy of the notes that Mr. Kaplan took down and typed up for me.

THE COURT: Did you get that Xeroxed?

MR. KLEINBARD: We have penciled notes on them.

MR. KAPLAN: I can take off one piece.

THE COURT: All right.

MR.PERSON: It is almost done, your Honor.

THE COURT: Okay.

Loss of gross profit on what?

MR. PERSON: Direct car sales by Nabcor for the same period. That's 400 cars times 447.30 per car. 178,920.

THE COURT: That's 400 cars times what, again?

MR. PERSON: 447.30.

THE COURT: That's 178,920.

MR. PERSON: Yes.

Public offering proceeds net, 240,000.

Liabilities of Nabcor first Celina, 150,000 plus interest. And liabilities to Nabcor franchisees for rescission or alleged breach of contract, 596,824.

MR. KAPLAN: Does that include or exclude the Celina?

MR. PERSON: That excludes Celina.

THE COURT: Well, look, I think that we can just refer by reference to this sheet. Mr. Kleinbard has given me a sheet which, I guess, is the summary which you are now giving us, and it was received by -- this is just a statement of what you told me on the phone yesterday, right?

MR. PERSON: Yes.

THE COURT: Okay.

Now, look, let's get down to specifics. Regardless of what theory you have, it seems to me it all boils down to the evidence about what particular franchisees and what Nabcor was in fact doing. What is the evidence on that? Let's take this -- let's just start with general auto sales and leasing, which makes a claim of almost $2 million.

What is the evidence about -- is there evidence that they had orders in hand which they could not fill because of the activities of General Motors?

MR. PERSON: Yes, your Honor.

THE COURT: What is that evidence?

MR. PERSON: That they went to various dealers with --

THE COURT: How many orders did they have on hand that they couldn't fill?

MR. PERSON: Approximately seven orders that they had trying to find dealers in the Buffalo area.

THE COURT: How long was General in the business of being a broker for Nabcor?

What were the dates?

MR. PERSON: It started with the Multi-Make franchise first.

THE COURT: All right. But the inclusive dates?

MR. KAPLAN: Some of them are in dispute.

THE COURT: Let's hear from Mr. Person.

MR. KAPLAN: Okay.

THE COURT: And let's now talk about Multi-Make and General as far as auto brokerage and not selling franchises. Just approximately.

MR. PERSON: October 6, 1967 was the second franchise.

THE COURT: What are the dates you are claiming about?

MR. PERSON: Up through the end of 1970.

THE COURT: You are talking about October '67 through the end of 1970?

MR. PERSON: No. 7/17/67.

THE COURT: All right. Let's say July '67 to the end of 1970. How many orders did they obtain?

MR. PERSON: They had at least seven orders that they were trying --

THE COURT: No. What is the total number of

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orders they obtained?

Does anybody have that, do you know?

MR. KAPLAN: There were 19 cars that they actually bought and, in addition, Mr. Strimple testifies that there may have been anywhere from three or four to twenty other orders, but he has no records.

THE COURT: He doesn't have records?

MR.KAPLAN: That's correct, and as far as Nabcor's books show, there was only one order by Strimple to Nabcor. There were also about four by Bolling, but we dispute that Multi-Make was in fact merged into General Auto Sales.

THE COURT: Let's just give them the benefit of the doubt.

MR. KAPLAN: There is only a difference of about four.

THE COURT: Let me go back to you, Mr. Person.

It seems to me that we have to have some type of proof that has to be made, and I just don't think that we are going to sit here and let people testify in generalities.

Now, I think the crucial thing on somebody's business is how many orders they got. Now, how many orders did General Get and what is the proof of that?

MR. PERSON: These are the orders. There was not a substantial number of orders, as you can see.

THE COURT: But what was the unsubstantial number?

MR. PERSON: What Mr. Kaplan has said is the evidence that I have.

THE COURT: That adds up to about how many orders?

MR. PERSON: No more than forty, and as --

[redacted]E COURT: Maximum nu[redacted] of forty.

I interrupted you.

MR. PERSON: And somewhere between thirty and forty.

THE COURT: What is the proof of that?

MR. PERSON: Don Bolling testimony and Dale Strimple and the Nabcor -- the purchases are in evidence already, the 19 that were bought.

THE COURT: What are the 19? The 19 that were bought through clients globally?

MR. KAPLAN: Largely Defendant's E that we offered.

THE COURT: So, can we start with the 19?

MR. KAPLAN: I suppose so.

Now, there appear to have been some more that

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they bought. Strimple's records just vanished.

THE COURT: All right. But we will start as far as evidence, and those 19 were filled, right?

MR. KAPLAN: Right.

THE COURT: Right, Mr. Person.

MR. PERSON: After the activities that affected him were not as substantial. This was in '68. This was in the --

THE COURT: No, but let's just talk about damages, and these orders were filled, the 19 were filled, right?

MR. PERSON: Correct.

THE COURT: Okay.

Now, what is the evidence about any orders over and above the 19? Is there any concrete evidence, any documentary evidence?

MR. KAPLAN: Very little. Strimple ordered one automobile and Bolling ordered three or four from Nabcor, which appear in Nabcor's order ledger.

THE COURT: That would be in addition to these?

MR. KAPLAN: In addition to the 19.

MR. PERSON: Seven altogether.

THE COURT: Just say the numbers again.

MR. KAPLAN: Strimple ordered one from Nabcor per Nabcor's order log, and he got it, and I thought Bolling had ordered four. Mr. Person tells me seven, but that is obviously not much of a difference.

THE COURT: Okay.

Mr. Person, what Mr. Kaplan is saying is that Strimple ordered one from Nabcor and got it; is that right?

MR. PERSON: I have got to find the card.

MR. KAPLAN: Call it the Theresa Strimple card. It was his daughter's car.

MR. PERSON: There were two orders by General. One was the Strimple car and the other one was --

THE COURT: You mean the orders from Nabcor?

MR. PERSON: From General to Nabcor, and the other one was on 9/25/68.

THE COURT: So you are saying that General ordered two cars from Nabcor; is that correct?

MR. PERSON: Yes.

THE COURT: Any more from Nabcor?

MR. PERSON: No.

THE COURT: Were those orders filled?

MR. PERSON: It is at the log page 30050, line 32.

MR. KAPLAN: That's Strimple's car for his daughter which was filled. It is only one car.

MR. PERSON: It was only one car. They put the wrong number.

THE COURT: Can we arrive -- how many cars did General order from Nabcor?

MR. PERSON: One.

THE COURT: One. And it got it?

MR. PERSON: Yes.

THE COURT: So we have got this car, we have got evidence of 19 cars ordered and obtained from Clements-Gillogly, and one car ordered and obtained by General from Nabcor. That's 20.

MR. PERSON: There were other dealers as well, not just Clements-Gillogly. There was a Paul Batt Buick.

THE COURT: So the 19 is 19 from Clements-Gillogly, et cetera. Okay.

Well, anyway, that is a total of 20. Any other orders?

MR. PERSON: The Multi-Mate orders, or the orders that preceded -- not from Nabcor.

THE COURT: Let's just get -- let's just get down -- I don't know what significance it has, but let's get the Multi-Mate orders.

What do you have in the way --

MR. PERSON: Multi-Mate had some orders when it went into General and when we are talking about the six or ~~seven~~ orders that were being brought around by Don Bolling and Strimple.

THE COURT: To whom?

MR. PERSON: To dealers,trying to get dealers to order those cars. These orders were not --

THE COURT: Are you saying that in addition to the 20 we are talking about that Multi-Make had seven orders?

MR. PERSON: Right.

THE COURT: Seven orders which were unfilled, which were made to Multi-Make and unfilled at the time of this merger; right?

MR. PERSON: Yes.

THE COURT: What is the evidence on that?

MR. PERSON: Don Bolling's testimony and the testimony, I believe, of Dale Strimple as well.

THE COURT: All right.

Any documents?

MR. KAPLAN: No.

MR. PERSON: I don't think there are any.

THE COURT: Who did they try to place those with?

MR. PERSON: Various dealers in Buffalo, including Dengler. Strimple says he took about five orders.

THE COURT: What happened to these?

MR. PERSON: At first they agreed to accept the orders and then they came back and said that they refused.

THE COURT: Are you saying that these were never filled?

MR. PERSON: I cannot say. I believe that they were not.

THE COURT: Now, what is the evidence, Mr. Person? Will somebody get on the stand and say that these seven orders were never filled and that they were lost, the customers went elsewhere?

MR. PERSON: Substantially, yes, I believe that.

THE COURT: It isn't a matter of "substantially." What will your witnesses say, or do you know?

MR. PERSON: I have to -- I shouldn't say, because I am guessing. I think that most of them went unfulfilled.

THE COURT: You don't know what the evidence will be about whether they were filled; right?

MR. PERSON: That is correct at this time.

THE COURT: In any event, after the merger, the business went on and got these orders filled through Clements-Gillogly, and so forth?

MR. PERSON: I don't think so.

THE COURT: I am not talking -- got orders filled.

MR. PERSON: Yes, but there were also orders placed with Nabcor by Multi-Make.

MR. KLEINBARD: That is what we have just been over, isn't it?

MR. PERSON: No.

MR. KLEINBARD: It's another? Okay.

MR. PERSON: And that began on 9/19/67 through 11/10/67.

THE COURT: Hor many orders did Multi-Make place to Nabcor?

MR. PERSON: A total of seven orders.

THE COURT: Seven orders.

What happened to them?

MR. PERSON: Three of them appeared to have been canceled.

THE COURT: Who canceled what to whom?

MR. KAPLAN: We think the evidence will show that Bolling canceled them, your Honor, because he didn't put up the deposit.

THE COURT: Are you claiming that these were orders which Nabcor was unable to fill because of the activity of General Motors?

MR. PERSON: Our records show that there is a cancellation on them and I don't have all the records here at this time.

MR. KAPLAN: To save time, your Honor, there are three orders from Multi-Make to Nabcor logged in by Nabcor November 13, 1967. The ledger indicates that no deposits were paid on them, and further entry canceled the November 17, 1967 appears, and we think the proof will show that Nabcor refused to order the cars because no deposits were placed.

THE COURT: Mr. Person, I think on this Multi-Make situation, I am not going to take a lot of time. I think you don't quite have the evidence lined up and I think this is somewhat incidental.

The main thing is what happened to General after General got started, and the picture as I see it is that there were 19 orders placed by General to dealers

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which were filled, one order placed by General to Nabcor which was filled.

Now, my question to you is: Were there any orders which General obtained from customers in addition to the twenty we have spoken about? And I am excluding for the moment the Multi-Make. Let's just put that aside.

MR. PERSON: Before the 13th, General was unable to get sources of supply, that is, prior to January '68.

THE COURT: What do you mean by the 13th?

MR. PERSON: General was unable to obtain -- and they had orders.

THE COURT: I know you are going to keep saying that, but that is not my question.

I want you to tell me specifically what orders General obtained and I want to exclude the Multi-Make orders for the moment. What orders did General obtain, if any, in addition to these twenty that we have described? You know the twenty I am talking about.

MR. PERSON: Right.

THE COURT: Any orders that General obtained from customers in addition to those.

MR. PERSON: I do not believe there was any substantial amount. I don't know, other than the ones that came in through Multi-Make or the ones that were there at the beginning, but I don't think there were -- the Paul Batt Buick was an order that ultimately was filled, but it was one that --

THE COURT: We have talked about that.

MR. PERSON: He was unable to hold sources of supply, and I believe that during that period he didn't attempt to general substantial orders without the sources of supply; that is what happened to him.

THE COURT: What is the evidence about his potential? You can't talk about $1,665,000 without some very concrete evidence about his potential. If he simply stopped trying to solicit because he didn't think he could get the cars, well, that is -- that is one thing that I guess could be prevented, but that is pretty far from proving in and of itself any potential at all.

From what you have told me now, I say General's damage claim is zero.

MR. PERSON: I just can't see --

THE COURT: Because I haven't got anything concrete. I don't accept as having any meaning a lot of generalities of the kind you are giving me. What is the proof?

MR. PERSON: General did not get started to have any substantial history of sales in order to be able to project the sales, to be able to show --

THE COURT: Why didn't it get started?

MR. PERSON: It wasn't able to get sources of supply by reason of the activities.

THE COURT: My friend, it obtained and filled orders for twenty cars, so to tell me that it didn't have any sources of supply is --

MR. PERSON: Well, that is what the evidence shows.

THE COURT: How does the evidence show that?

MR. PERSON: The evidence shows that before 1968 he was, with the exception of one Maier Schule with two car orders, he was prevented from obtaining any source.

THE COURT: Let's assume -- I don't know whether that is true or not. But let us assume for the moment it is. The evidence which I have seen indicates that there were sources of supply in Buffalo in 1968 and thereafter, so let us suppose you had a little brokerage company starting up in '67 and they got the cold shoulder from the General Motors dealers, and let us assume that, okay? Then let us assume that, for some reason, they are able to start buying in 1968.

Well, if it was an antitrust violation in 1967, it might be that they could recover for some unfilled orders in 1967 if they could prove the orders, but, as far as 1968, it is a new ball game and there is no use continuing to talk about 1967.

What is the evidence about shutout in 1968 and 1969 and 1970?

MR. PERSON: The damage to General occurred by reason of depletion of capital during the period of starting the business.

THE COURT: What depletion of capital? I thought you didn't have to have any capital to do an auto brokerage business.

MR. PERSON: They had some capital, and by virtue of the activities the limited amount he needed to get started with was depleted, and the result was he wasn't subsequently able to recover from that.

THE COURT: Can I see the list of those purchases in Buffalo?

(Document handed to the Court.)

MR. PERSON: And also the '68 sources of supply are not clean sources of supply, according to the testimony.

THE COURT: Clean or unclean, he got cars.

Look, Mr. Person, I am sitting here. I haven't heard evidence of a dime of damage to General.

MR. PERSON: I can't -- I just don't --

THE COURT: There are a lot of things I could hear; there are a lot of things that you could present if it happened.

I have some rational notion, some elementary notion of what it takes to prove damages in lawsuits. I haven't heard anything.

MR. PERSON: If it is strictly lost orders, I think that that is difficult, other than on a projected basis.

THE COURT: It is awfully difficult and -- but lost orders are significant, not just in figuring the lost profit from the particular orders, but it would be circumstantial evidence of a potential, and really -- I don't say it is the only way, but you have made a very, very heavy pitch in this case for people about this refusal to deal. I have heard this and heard and heard this.

Except in '67, I haven't heard a word this afternoon about a refusal to deal in '68, '69 or '70.

MR. PERSON: With General, his testimony is.

that he was attempting to set up his distribution system and in finding out that he could not get sources of supply, that he found it necessary to see if he could get these. In other words, he worked on getting sources of supply.

THE COURT: Why did he need sources of supply?

MR. PERSON: For the automobiles, because he found that with the initial orders that he got he couldn't get the sources of supply for those orders, so that he needed to try to find sources of supply and was unable to during the period of the formation; that is, when he was trying to get started, his business was nipped in the bud.

THE COURT: It just wasn't. Let's face the facts.

Was his deposition taken?

MR. KAPLAN: At some length.

THE COURT: What happened to him? Didn't you summarize this?

MR. KAPLAN: We certainly did. We certainly did.

THE COURT: You don't happen to have that memo, do you?

MR. KLEINBARD: The memorandum back around the class action?

MR. KAPLAN: We don't have it down here.

MR. KLEINBARD: We can bring it tomorrow.

MR. KAPLAN: Strimple's testimony is that he went around looking for dealers that would agree to sell him two hundred cars at a shot at $25 over and that he had with him five orders --

THE COURT: What orders did he have for all those cars?

MR. KAPLAN: He had five orders and he went in and he claimed to have had problems with them.

There are obviously all sorts of reasons why he had problems, but the only claims he makes about refusal to deal relate to this proposal for two hundred cars at $25 over cost, and that these all took place approximately October 1, '67, and that starting some time very early in 1968 he was able to get absolutely any car he wanted from anybody in Buffalo, and that what had happened is that he had just given up and he was selling used cars.

THE COURT: Given up why? Did he do anything to develop a clientele for the brokerage?

MR. KAPLAN: Not really. There was a piece of testimony from the preliminary hearing from Strimple.

When Strimple sold his franchise, he was told that he would make a million dollars the first year by selling a thousand franchises in New York State and Strimple was in this business to sell those franchises as he indicated on the stand.

Bolling was in it to sell cars.

Strimple, for whatever reasons, was not successful in getting his franchise sales operation started at the end of '67, and I think it was for reasons that had nothing to do with supply of cars. But, passing that, by the time he realized he was not going to make a million dollars the first year of selling a thousand franchises, he pretty much gave up.

Strimple is kind of a chronic ne'er-do-well in Buffao. He had been with a Rambler dealer that folded. Your Honor, he was the sales manager of a dealership that went bust. He was thereafter selling from one location Nabcor cars, at some later point Econo-car leases, Amway distributorships, real estate, land in Florida, cakes, and I don't know how many other things, but that is what he was doing. He was not really -- excuse me, not really in the car business.

MR.PERSON: The business that he was trying to found, he found himself unable to go any further because of the depletion of capital.

MR. KAPLAN: He only had $8,000 to start with.

MR. KAPLAN: That was his depletion.

MR. KLEINBARD: Talking about a three-month period.

MR. KAPLAN: He didn't even order cars from Nabcor.

THE COURT: I don't understand the relation of the capital, either.

MR. PERSON: If a person only has a limited amount of capital, the capital needs are greater. If you don't have that capital, you can't make it.

THE COURT: What was the need for capital?

MR. PERSON: The capital to be able to do --

THE COURT: To do what?

MR. PERSON: Pay the overhead expenses.

THE COURT: What overhead?

MR. PERSON: A personal salary that you have to live on in that time. You have the rent --

THE COURT: But he kept going. You say he kept going through the end of 1970.

MR. PERSON: But he has testified that he was without funds, too.

THE COURT: Well, so what?

MR. PERSON: That's what happens if the money that he sets aside to go into the business would be adequate for the business if the intereference doesn't occur --

THE COURT: If he could sell all these cars, if he really got on his horse and it was a viable business idea, and he could sell cars and begin making money, if he could go around and talk and place phone calls and so forth, I don't see, really, the capital problem. It doesn't make any sense to me.

MR. PERSON: It does, because we are talking about a period of about a quarter-year during which his capital was not productive of anything, so that $8,000 for a quarter-year is not very long; that is not very much money for that length of time. So that by the time --

THE COURT: I tell you now that I don't think there is a dime damage to Strimple. I don't think his claim is worth anything as far as auto sales, and I think this $1,992,000 is absolutely a pipe dream.

I don't think I am demented. I don't think that I am so unaware of the rules of proving damages that the statement has no meaning, and I think you had better, in evaluating your case, conceivably take that seriously.

You haven't articulated anything to me that makes any sense.

What about this franchise? Where were his prospects for franchises?

MR. PERSON: Throughout the New York State area, other than the part that Turco had.

THE COURT: What did he do to try to sell franchises? Did he travel to talk to people? Did he place phone calls?

MR. PERSON: He began to do that, but in realization that he couldn't get sources of supply, he stopped selling franchises so he didn't sell too many.

THE COURT: What you say, I have got to tell you, it doesn't make any sense, because he had sources of supply.

MR. PERSON: He didn't at the outset of his business.

THE COURT: Let's give him damages for the outset.

MR. PERSON: What happens, though, is that by virtue of these activities he is prevented from going any further.

THE COURT: He wasn't. He just wasn't, my friend. That's all there is to it. Okay.

As far as I am concerned, we cut $1,992,424 out of this damage claim.

I don't think that could even get to a jury.

MR. PERSON: I don't see how you can say that when he puts money into a business and he is forced out of business because of the activities --

THE COURT: There is a very serious question of credibility as to whether he is forced out of the business, but let's assume -- the only thing you have told me is that some sales in 1967, some orders that he couldn't fill, and he had a problem at that time.

I have got to tell you that I think that is -- the chances are very great that his story about '67 won't hold up, but that is -- I am sure -- that may be a jury question, but even granting it, you have made a very big pitch for a low overhead business, and I recall from his testimony he managed to continue to have a place of business in 1968 and he got cars, which means he had a place of business, he had a telephone, he had stationery, he had something which he could use to perform this very low overhead type of business, and there is no reason in the world to say that he couldn't keep on.

MR. PERSON: There is evidence that on a

a refund that he had to give a customer, he was so broke at this time that he had to pay the customer back at the rate of a hundred dollars a month.

THE COURT: He wasn't trying to sell many cars. Was he doing anything to sell franchises? Was he traveling around, writing letters, putting in phone calls? If this was all so good, you could get, it seems to me, some awfully quick income. Did he ever sell a franchise?

MR. KAPLAN: No.

THE COURT: Did he ever try?

MR. PERSON: He did try to sell, I believe.

THE COURT: Who did he try with? Who did he call?

MR. PERSON: I don't have the answer.

THE COURT: I don't know how you could go to trial without the answer. I think at least on General, we are having a trial, we have got one guy here in the way of a plaintiff that you don't have any real, viable information to even present a damage claim. And I think it is really an imposition.

What about Alfred J. Young, $759,000? How many orders did Alfred J. Young get from customers?

MR. PERSON: He had about 36.

THE COURT: Who did he present them to? Nabcor or dealers directly or what?

Incidentally, how longwas he in business?

MR. PERSON: May 26, 1967.

THE COURT: To when?

MR. PERSON: To 1971 or beyond.

THE COURT: How many orders for cars did he obtain?

MR. PERSON: He had 29 sales completed.

THE COURT: Completed sales?

MR. PERSON: Completed sales.

THE COURT: Did he obtain any orders in addition to the 29?

MR. PERSON: He had approximately seven orders that he could not obtain cars on.

THE COURT: So he got seven orders that he could not fill; right?

MR. PERSON: Yes.

THE COURT: Okay.

THE COURT: Why couldn't he fill those? Did he place those orders --

MR. PERSON: Some of them were through Strimple.

THE COURT: In other words, he gave some orders to Strimple?

MR. PERSON: The first of the seven.

THE COURT: One of these made to Strimple; right?

MR. PERSON: I think four orders were given to Strimple.

THE COURT: Four given to Strimple.

What were the other three?

MR. PERSON: Three orders were given to Nabcor in 1971.

THE COURT: Why weren't they filled? What did Strimple do with the four orders?

MR. PERSON: I don't know what he did with them. I assume that he couldn't get them.

THE COURT: Mr. Person, you have got a damage claim here and we are in the middle of a trial and there isn't a question that I am asking you that you should not be able to answer.

What happened to the four orders? The fact that Young gave them to Strimple means nothing. What did Strimple do with them? Strimple -- when were these orders, these four?

MR. PERSON: Prior to '71.

THE COURT: There is no reason for me to believe that Strimpel could not have gotten four cars.

Have you got any reason to thus believe?

Okay. Let's pass it.

You have no proof, as far as I can see, about any problem about those four that would relate to General Motors.

What about the three to Nabcor? What happened to them?

MR. KAPLAN: They are after the damage period anyway, your Honor.

THE COURT: Was there a cutoff?

MR. KAPLAN: Yes, December 10, 1970.

THE COURT: Just for the heck of it, what happened to the three?

MR. KAPLAN: The three orders appeared not to have been delivered.

THE COURT: Why?

MR. KAPLAN: I can't give a reason for the nondelivery.

THE COURT: All right. So we have no proof about any General Motor's responsibility about the seven. So we have 29 completed sales and seven orders which could not be filled for reasons which we do not know.

What is the basis for saying that he should get $239,000 for 120 unsold cars?

MR. PERSON: The basis is that --

THE COURT: Wait a minute, wait a minute. 120 cars in 1967 and another 600, I guess, for '68, '69 and '70; so you have got 720 cars.

What is the basis for saying he could have sold 720 cars during '67 through '70?

MR. PERSON: The basis is that a broker with the proper support from the franchisees that were over him should have been able to sell 200 cars a year.

THE COURT: What support was he supposed to get?

MR. PERSON: From Nabcor and from --

THE COURT: Was he a subbroker to --

MR. PERSON: To Strimple and to Nabcor.

THE COURT: He was out there -- what did he do to get orders for cars beyond the -- beyond the 36?

MR. PERSON: With the franchise or in a position without interference, the franchisee would have the support that any franchisee --

THE COURT: These are all generalities. I can't use that any more. What was he doing to get orders? The evidence that I have again is that this guy could go out and he could make a call, and he could talk to somebody on the street, or he could go to somebody's home and he could get an order for a car.

The evidence is pretty clear that when, at least in quite a few cases, when that was done, they managed to get them from Clements-Gillogly or Batt or whatever.

What was he doing to get orders for cars?

MR. PERSON: He was soliciting, attempting to get it.

THE COURT: Was he working full-time or part-time?

MR. PERSON: He had a used car plus a new car --

MR. KAPLAN: He ran a gas station is what he did.

THE COURT: He ran a gas station? You say new car, was he an agent or franchisee?

MR. PERSON: He had the Nabcor new car and he had used cars.

THE COURT: Did he have a used car lot?

MR. PERSON: He was repairing cars.

THE COURT: He had a gas station?

MR. PERSON: Yes.

THE COURT: How much time did he spend trying to get automobile orders on the Nabcor thing?

MR. PERSON: Part-time. I don't have his percentage.

THE COURT: Well, did he call on one person a day or make a telephone call,or once a week or once a month or once in six months, or what did he do?

MR. PERSON: He has probably testified to that and I don't have it --

THE COURT: Was a deposition taken?

MR. KAPLAN: Yes, his deposition was taken. I don't know if that precise question was asked, but basically in his deposition he said that with a couple of exceptions he got all the cars he ever wanted.

THE COURT: What did he do to generate business?

MR. KAPLAN: I can't answer that just offhand.

THE COURT: I say his damage claim is worth nothing. I haven't heard anything.

MR. KAPLAN: I think that the loss of the support services from the franchisor is an important part of this.

THE COURT: What, in specifics, did he need that he didn't get? Did he ever call up and ask, "I want this support service," and was it refused?

MR. PERSON: The support services are assisting the brokers in marketing, in having -- making financing arrangements.

THE COURT: Was there ever a situation where he had a buyer for a car lined up and they couldn't get the financing?

MR. PERSON: I do not know that.

THE COURT: Was there any support service that he sought that he could not obtain? Is there any evidence of that?

MR. PERSON: The marketing effort that Nabcor -- that he was entitled to.

THE COURT: What marketing effort?

MR. PERSON: That Nabcor as the franchisor is responsible for establishing the system and assisting the brokers in various ways.

THE COURT: Mr. Person, what ways that he needed that he wasn't getting that is General Motors' fault? It wasn't General Motors' fault, it seems to me, that Maiorana didn't go around and give pep talks to the brokers. General Motors wasn't preventing him from getting airplane tickets.

MR. PERSON: No, but if the finances of Nabcor are depleted by the activities of General Motors, then it stops what the money would have bought.

THE COURT: What was he going to buy that would have helped?

MR. PERSON: It would have bought just what you were referring to, the persons who drop in and work with him in getting his place.

I think it is important to understand the relationship between the two. A franchisee is not totally independent; he is dependent upon the franchisor and if you cripple the franchisor --

THE COURT: We will get to the franchisor eventually.

What about Jamele, $270,000? What period of time was he in business?

MR. PERSON: 8/10/66, I suppose, off and on up to his death.

THE COURT: When was that?

MR. PERSON: At least I have something through his deposition on April 12, 1973.

THE COURT: Through 1970 and beyond, you are saying. Okay.

MR. PERSON: Yes.

THE COURT: How many orders did he obtain from customers?

MR. PERSON: I have seventeen.

THE COURT: Seventeen orders?

MR. PERSON: From 11/3/66 to 3/5/71.

THE COURT: Where they filled?

MR.PERSON: No. Some were and some were not. I don't have the card for some reason.

THE COURT: Do you know anything about whether they were filled or unfilled?

MR. PERSON: Some were not.

THE COURT: How many were filled and how many were not filled?

MR. PERSON: I don't have the card for some reason.

THE COURT: Does anybody know?

MR. KAPLAN: I have a summary of his deposition testimony. In his deposition, Jamele testified that he had no problems obtaining most of the cars that he ordered; that during the last couple of years prior to the deposition, which was in '73, he had problems obtaining two 1973 Cadillacs, and that there had also been a Corvette in '66 or '67, and that is all I found running through this summary.

MR. PERSON: That was Don Allen's Corvette, the first --

MR. KLEINBARD: The first of the ten orders?

MR. KAPLAN: The general thrust of his deposition was that he didn't have problems getting cars, that he had problems with the Motor Vehicle Bureau.

THE COURT: So that the other two would be after 1970?

MR. KAPLAN: Yes.

MR. KLEINBARD: Right.

MR. KAPLAN: There may be some others.

MR. PERSON: There were a couple of Cadillacs, I think.

THE COURT: What are you claiming? How many cars do you claim he was denied because of the --

MR. PERSON: There was a Colonial Cadillac that he did not get.

THE COURT: When?

MR. PERSON: 11/23/66 was the date of the order.

MR. KAPLAN: That's predamage.

MR. PERSON: I am sorry, but he didn't get it. It was ordered then and not received by the end of the year.

THE COURT: I wish you could give me more specific information of what you claim as to these seventeen orders.

MR. KAPLAN: That there were some cancellations.

THE COURT: Some?

MR. PERSON: I don't have my card here, but I identified a couple of these anyway, the Corvette and the Cadillac, Don Allen and Colonial.

THE COURT: How does he get damages? How do you say --

MR. PERSON: I am not computing damages based upon the number of autos.

THE COURT: I am well aware of that, but I want to know, in your listing you say 200 cars per year. 200 cars per year what years?

MR. PERSON: For the years after the franchise --

MR. KAPLAN: He had the franchise in '66. It is just '67 through '70 because '66 is barred by the statute of limitations.

THE COURT: All right. '67 through '70, which would be four years; right?

MR. KAPLAN: Right.

THE COURT: So it is 800 cars and he got seventeen orders. How do we get up to 800?

MR. PERSON: On the same basis that the

interference with his own orders and the interference with Nabcor made it impossible for him to conduct his business as it would have and should have been done.

THE COURT: What did he do to try to conduct this business? Who was he? Did he work full-time at this?

MR. PERSON: He had a used car operation and --

THE COURT: Did he spend any time trying to drum up orders on Nabcor business?

MR. PERSON: I was going back. He testified that the Nabcor business was a way to get used cars to him.

THE COURT: I don't understand.

MR. KAPLAN: He wanted to get the good trade-ins. He just used the new cars to get the attractive trade-ins, I gather, is what he meant.

THE COURT: In other words, he would sell a car through Nabcor and get the old car from the client?

MR. KAPLAN: Right. He said that was more profitable than selling the new cars.

THE COURT: But he had the used car business?

MR. KAPLAN: That -- even that appears to be unclear. At one point in his deposition he said he went out of the used car business at the end of '66 or '67, and then until sometime in 1970 he worked out of his business and was otherwise unemployed.

THE COURT: Doing what?

MR. KAPLAN: Selling new and used cars out of his house.

THE COURT: How much time did he spend?

MR. KAPLAN: No way to know. He was unemployed.

THE COURT: This is a little murky about whether he actually was unable to fill some of the seventeen orders because of some problem in this case, but that is not really the damage claim, anyway.

I haven't heard any statement that would indicate there is the slightest basis for going into some projection of lost profit on cars which he would have sold when he didn't even have the order, so I think this is another -- it is just like the other situations. We don't have -- we've got a big, fancy figure sitting here and it couldn't even get to the jury. It is just sheer speculation.

I put a zero on Jamele, like I have on the others.

I thought we had Turco's outfit here.

MR. KAPLAN: We did. We weren't provided with any information.

THE COURT: What about Turco? I would like to cover the brokers before we get to Nabcor and the Marioranas.

MR. PERSON: I haven't had the chance to put that together.

THE COURT: All right. As of now, that is zero.

Let's go to Nabcor. How many orders for cars did Nabcor obtain from anybody, from brokers, from customers? And maybe we need to break it down. But let's start with the car orders that they obtained.

How many did they obtain? What period of time were they in the auto business, early '66 to what? Throughtout the damage period, right?

MR. KAPLAN: Yes.

THE COURT: Until the end of 1970, how many cars, how many orders for cars did they get?

MR. KAPLAN: I thought we established that the other day in court there were no more than 700.

MR. KLEINBARD: 699, and I rounded it off to 700. That's Plaintiffs' Exhibit 450.

THE COURT: Is it useful to break that down between orders from brokers and orders from their own customers?

MR. KAPLAN: I think there were only the six from their own customers.

THE COURT: Okay. So we will say all from brokers, except a tiny number, about six.

MR. PERSON: Are you taking just the four-year period?

MR. KAPLAN: Yes.

THE COURT: Is that figure right?

MR. PERSON: That's correct.

THE COURT: Use 700. How many couldn't they fill or didn't they fill?

MR. PERSON: I don't have the police books.

MR. SILVERMAN: I have them here.

THE COURT: I am not interested in the police books. I am interested in a figure.

How many didn't they fill?

MR. PERSON: The police books represent --

MR. KAPLAN: We can give you a rough idea.

According to the police books, they sold about 745 -- I am sorry, about 645 automobiles by the end of 1970, of which some proportion was used.

THE COURT: Wait a minute. Say that again.

MR. PERSON: They sold by December of '70 about 645 cars, of which some small proportion were used cars. That's a rough number.

THE COURT: Look, Mr. Person, I am relying on you still to tell me how many out of these orders they couldn't fill. It is a very important and very basic figure.

MR. PERSON: I got the refusals that occurred with the various GM dealers and I --

THE COURT: How do you get refusals if you don't get --

MR. PERSON: I got that, the refusals were 44 Colonial -- 43 Colonial Cadillac orders, and I don't believe that any were filled, but I can't represent that. I have really got to go back and verify that that is true in each case.

So I can start with the --

THE COURT: What is your story on Nabcor? You see, Nabcor wasn't getting an inventory as I understand it; right?

MR. PERSON: That's correct.

THE COURT: What I am trying to do is to piece together the story on Nabcor.

MR. KAPLAN: I think this will help quite a lot.

In Nabcor's offering ciruclar to the SEC, as amended April 29, 1971, Defendant's Exhibit F-6, they state that over the entire period of Nabcor's existence, there were 140 orders for new automobiles which they didn't fill. That appears at page 7.

Of course, we by no means concede that is correct. I think that is inflated, but that is their outstanding figure.

THE COURT: I don't think that is in -- well, it is early 1971. What is the date?

MR. KLEINBARD: Originally General then amended --

MR. KAPLAN: Then amended in April of '71. And the key thing about it is that it is filed after the lawsuit is commenced.

THE COURT: Okay. At least maybe that is a maximum.

MR. KLEINBARD: That is an outside figure.

THE COURT: Let me just start trying to reason it out. I gather that Frank Maiorana would try to go to one or another dealers and get some sort of commitments to sell many cars, 200 cars a year, that kind of thing.

MR. PERSON: In some cases yes, but normally I believe it was really an open end.

THE COURT: All right. I am not trying to -- that I really was basically trying to say that. But as far as actual orders for cars, he did not, and I mean Nabcor did not try to order cars for an inventory to be ready to fill orders; right?

MR. PERSON: Correct.

THE COURT: Okay. So the real test is, it seems to me, as measuring actual alleged refusals to deal is to take the number of cars which Nabcor obtained orders for and see what they did with those.

Did they transmit to franchise dealers all the 700 orders?

MR. PERSON: All but a few, your Honor, and a negligible number.

THE COURT: All right.

You are not able to provide me with specific numbers of orders placed by Nabcor with dealers and, of course, here we have got a case involving General Motors so we are particularly interested in orders placed by Nabcor with General Motors dealers, and then, out of that number of orders, we would want to know the number filled and the number unfilled, both in total and as to General Motors dealers.

Do you have that?

MR. PERSON: I would have to compile that. I don't have it broken down.

THE COURT: I don't understand. I am not trying to complain at you personally. Please don't misunderstand that. But I am worried about the trial of this case.

Now I realize I could have spent August here instead of going on vacation. I could have spent August and we could have had a long pretrial and we might have gotten organized, and it didn't get organized. That is just basic.

You just have nothing without that information.

MR. PERSON: I have each of the GM dealers through whom we ordered cars, including the number of cars ordered, on these sheets.

I also have the indications of cancellations. It is all compiled, except that the numbers have not been totaled. It is relatively simple to get the total number of GM --

THE COURT: It is relatively simple, but that is what we were gathering here tonight. I specifically asked you to have it.

MR. PERSON: I have been trying to put together as much as I can, your Honor.

THE COURT: It seems to me that, regardless of all these fancy million-dollar items you have listed, really the guts of the case as to Nabcor on damages is to start where we are talking about, because the amount of business actually in hand versus the amount of orders that were filled and the orders that were unfilled; that is the start.

Then, as far as the potential of the auto business beyond those orders, we have three brokers so far, Young, Jamele and General, where, in my view, Mr. Person, we haven't a lick of evidence that they were unable to obtain cars or -- let me put it this way. We don't have any evidence that they generated any substantial amount of business that they weren't able to fill.

Where are the brokers that had the potential of running millions and millions of dollars' worth of commissions to Nabcor?

Let me start.

The $4 million figure loss of royalty -- I am starting again. Yes, some of these other figures are franchises. Let's take the $4 million figure. Loss of royalty income on cars which the brokers Nabcor actually franchised would have sold but for the alleged conspiracy.

How many cars are you referring to?

MR. PERSON: 200 apiece, your Honor.

THE COURT: 200 apiece for what?

MR. PERSON: Throughout --

THE COURT: For how many dealers?

MR. KLEINBARD: You mean brokers, your Honor.

THE COURT: Brokers.

MR. PERSON: It was based upon the -- it was a mean average number of brokers.

MR. KAPLAN: 200 cars per broker per year?

MR. PERSON: Mean average brokers.

THE COURT: I don't know what that means.

MR. PERSON: A certain number of brokers were in by the end of '66, 58 brokers.

THE COURT: Let's list them.

How do you get this $4,000,917? You must have done some multiplying.

MR. PERSON: In 1966, there were 58 -- I am sorry, 54 brokers.

THE COURT: So you take 54 times 200 --

MR. PERSON: Nothing yet, because I am not covering '66. I am leaving '66 blank.

THE COURT: In other words, the '66 figure is not included -- that's right. You don't have anything in your calculation.

Let's say 1967, because that is the year you start calculating. How many brokers?

MR. PERSON: In the following year there were 38 brokers, averaging that to 19.

THE COURT: What do you mean, averaging it to 19?

MR. PERSON: Just cutting it in half, mean for the year would be 19. Adding that to 54 you get 73 brokers, effective brokers for the year 1967, and when you multiply that times 200 cars, at 100 cars per year, it was 100 cars per year.

THE COURT: 100 cars per year?

MR. PERSON: 100 cars per year per broker.

THE COURT: So you have got 7,300 cars, right, for '67?

MR. PERSON: 7,300 cars, and at a gross profit to Nabcor of 54.24.

THE COURT: So you multiply --

MR. PERSON: 109.21.

THE COURT: You multiply the 7,300 by what?

MR. PERSON: 109.21.

THE COURT: $109.21?

MR. PERSON: Right.

THE COURT: What is the basis for the $109.21?

Let's pass that. I will just take that figure.

Now, how about 1968? Just give me the net result.

MR. PERSON: In '67 the figure would be 797,233.

THE COURT: So '67, 791,000, 797,233.

Let's take '68. How many brokers did you end up with?

MR.PERSON: There were eleven brokers and --

THE COURT: Added?

MR. PERSON: Then we have to add --

MR. KLEINBARD: Eleven left or eleven added?

MR.PERSON: 1966 was 54; '67 was 38, '68 was 11.

If we take half of 11, that equals 5, and add it to the first two.

THE COURT: So you are going to add 5 to 73 and you get 78?

MR. PERSON: No, because 73 was included only half of one year, so that the new total would be 97, the first two years plus half the third year.

THE COURT: All right, 97 brokers. Are you figuring your damages on the basis of 97 brokers for '68?

MR. PERSON: Right.

THE COURT: Okay. How do you calculate it?

MR. PERSON: By the first -- 54 brokers plus 38 --

THE COURT: I know, but what do you do with the 97 brokers?

MR. PERSON: Multiply it by 100 cars per broker times 109.21.

THE COURT: What is the figure?

MR. PERSON: 1,059,337.

THE COURT: Meaning a million dollars?

MR. PERSON: Right.

THE COURT: Okay. 1969.

MR. PERSON: 18 brokers brings it up to 112 as an average number of brokers for that year times 109.21.

THE COURT: Times a hundred?

MR. PERSON: Times a hundred times 109.21.

THE COURT: What do we have?

MR. PERSON: 1,223,152.

THE COURT: 1,223,000.

Okay, 1970.

MR. PERSON: 139 is the number of brokers on the average. Times 100 times 109.21, 1,518,019.

THE COURT: Jusg give me a dollar figure.

MR. PERSON: 1,518,019.

THE COURT: Okay. What is your evidence that these brokers would have generated a hundred cars a year? I could conceive of that if we had any specific cases that they were -- have you got any specific case of any broker getting 100 orders a year? How many got 100 orders in any year?

MR. PERSON: Nobody got 100 in a year.

THE COURT: What is the highest you have?

MR. PERSON: The highest I have for a one-month period is 22 cars.

THE COURT: Please give me the year. What is the highest annual figure of orders obtained by any broker?

MR. PERSON: It probably is Wilson, A. D. Wilson, Nabcor Delaware auto brokers.

THE COURT: How many did he get? What year?

MR. PERSON: From the period November 3,

1969 to July 24, 1970 he had 64 cars.

MR. KAPLAN: Did he have brokers under him?

MR. PERSON: I can't tell from this.

It looks like he was a sub-broker.

THE COURT: We are interested in the sales by individual brokers, not sales accumulated.

MR. PERSON: I recognize that.

THE COURT: So you are saying that A. D. Wilson sold 64 cars in a period of time you described?

MR. PERSON: Correct.

THE COURT: Roughly maybe nine months.

Have you got an average annual?

MR. PERSON: I have extracted the top month for each of the brokers that had about -- I tried to do it with about ten cars or more.

THE COURT: Mr. Person, how many brokers have you got actual annual car sales for? In other words, the amount of orders they have obtained or the amount of sales they did, whatever it is. For what brokers do you have actual sales figures for in terms of cars, either orders obtained or sales made?

MR. PERSON: I have the total orders by each broker, but not broken down by years.

THE COURT: What is the total? Total for each broker?

MR. PERSON: I have the total number of orders by each broker.

THE COURT: For all of these 139 or so, if that is the total figure?

MR. PERSON: For those that submitted orders.

THE COURT: How many brokers do you have figures for?

(Pause)

MR. PERSON: 85.

THE COURT: 85. What figures do you have, orders that were refused by Nabcor?

MR. PERSON: Correct.

MR. KAPLAN: Am I correct that the original 160 didn't submit any orders?

MR. PERSON: They are not recorded in the log, but then there were locates that didn't appear in the log.

MR. KAPLAN: But there is no record of any orders for 165 out of 250 brokers, right?

THE COURT: I don't know what figures you are using.

MR. KAPLAN: Maiorana testified there were 250 brokers. Ms. Person says he has figures --

THE COURT: He is basing his damage figures on these figures we have given which never amounted to 250.

MR. KAPLAN: Well, even if you take that number, which is say 140 or something, he's got another 50 or 60 brokers.

THE COURT: Let's just stick with these figures. I don't quite understand how they are compiled.

MR. PERSON: Just all the orders that the brokers submitted.

THE COURT: Okay. What is your proof going to be -- let's take the 85. Let's take the 85 brokers, the orders to Nabcor. The thing that I guess this might exclude would be orders placed directly to dealers that didn't come through Nabcor, right?

MR. PERSON: Correct.

THE COURT: Do you have any information on such orders?

MR. PERSON: Only from General and Turco.

THE COURT: And how many did they -- what is the volume of that?

MR. PERSON: General was approximately 19, I guess.

THE COURT: 19 from General, how many from Turco?

(Pause)

THE COURT: Is it ten or --

MR. PERSON: It is a couple of hundred, I believe. I have it in the file. Do you have it?

MR. KAPLAN: Not offhand.

MR. PERSON: 212 including 71 models.

THE COURT: 212.

MR. PERSON: That doesn't -- take out the ones that were -- that's wrong. It doesn't deduct.

MR. KAPLAN: We have that in the courtroom. I will go get that.

THE COURT: Again, let's go back to the -- let's exclude General and Turco for the moment. Do you have any figures? What is the total that the 85 brokers ordered of Nabcor?

MR. PERSON: It should add up to at least 700, correct?

THE COURT: It would be 700.

All right. I would like to do this. Take the 67, this will be easy. The total number of cars you are basing, you have got 7300 in '67, you've got 9700 in '68, you've got, I guess 11,169, these are numbers of cars that you used, you've got 13,900 in 1970.

Can you give me a total on that? Have you got a calculator? Add 7300, 9700, 11,200, 13,900. What is the total?

MR. KAPLAN: 42,100.

THE COURT: Okay.

Look, Mr. Person, you are claiming damages on the basis of potential orders of 42,100, and we got actual orders of 700 plus 19 for General and let's add in another 200 for Turco, but less than a thousand.

MR. KAPLAN: I think it is eight for Turco. It is eight for Turco.

THE COURT: What do you mean eight, I think it was 212.

MR. KAPLAN: He ordered 212 cars but with the exception of eight they came through Nabcor.

THE COURT: Is that correct, Mr. Person?

MR. PERSON: Yes.

THE COURT: Let's add eight so we've got about 725 cars, 727 cars actually ordered. How do we get up to 42,100?

MR. PERSON: These are first of all on

the actual brokers.

MR. KAPLAN: It is only saying that each of the brokers that Nabcor had should have had a hundred cars.

THE COURT: Should have done what?

MR. PERSON: If the interference had not occurred.

THE COURT: But according to your own calculations, out of this whole -- this 700 is all they could get, no, that is not right. I am thinking of it a little different. You've got denials here out of the 727, you've got maximum denials, inabilities to obtain cars, of I don't know, let's say 73, something like that. In other words, what I am saying is if you add the 700, you add the 19 for General and the eight for Turco, 727 cars. Let's just take for instance, the 645 cars sold and let's assume that the rest were --

MR. KAPLAN: That may -- that includes a certain number of used cars but if you take the numbers.

THE COURT: We are not being very exact here, we don't have to.

MR. KAPLAN: You can take the number out of their prospectus.

MR. KLEIN: I think if you take 75.

MR. KAPLAN: It is certainly no more than double that.

THE COURT: If I took and subtracted 727 -- took 645 and subtracted it from 727 I've got 82 cars. Now let's just take the 82 becasue it doesn't make any difference, we could call it a hundred. The picture is this. That yes, they were unable to obtain 100 cars, let us say, but to go from there to talk about a potential market unfilled of 42,100, it just isn't there.

MR. PERSON: It is though. It is becasue 100 cars a year is something that a Nabcor broker couldhave done in the absence --

THE COURT: How are you going to stick General Motors, incidentally? How many of these cars would have been gotten from General Motors versus Ford?

MR. PERSON: Mostly GM.

THE COURT: Let's say it is GM. This would have increased your sales over that period of time sustantially.

MR. KLEINBARD: Some years it would have been very welcome.

THE COURT: You might have--

MR. PERSON: Taken away from their dealers.

THE COURT: Turned the company around. But let us return to serious matters. This is--you know, I don't even have the right word. There is nothing I have heard which can possibly tag General Motors with failing or preventing your company from getting orders for 42,100 cars. Sure you can do a lot of arithmetic, and you can talk about the potential, but potential involves a lot of things and the potential involves some guy going out and trying. I have not seen anybody around here who is able to--in the three or four instances we have talked about, I have not seen anybody who was begining to be able, from his own efforts, to generate a hundred cars a year. I don't mean he was not able, if he worked at it. Maybe he was, but he was not presenting General Motors, or Nabcor, with that amount of business and getting turned down on it, and that is the real question.

MR. PERSON: I think that the interference happened enough so that the people, the brokers, did not have too long to go with Nabcor until they felt the effects of it and therefore it just stopped their activity.

THE COURT: How many brokers are you going to bring in?

MR. PERSON: I put down a number, I think around ten or so.

THE COURT: Who is going to come in and who are the brokers you are going to bring in?

MR. PERSON: Herbert Bly is one.

THE COURT: Let's have the whole ten.

MR. PERSON: I don't have the list.

THE COURT: I think we have got the list, don't we?

MR. KLEINBARD: It is on that typewritten sheet.

THE COURT: Okay.

(Pause.)

THE COURT: All right, we have got a list that you handed us this week. There are thirteen names designated as franchisees. Maybe some of them were with the same company, I don't know.

MR. KAPLAN: Yes.

THE COURT: But you have got thirteen names. Of course, you have got the plaintiffs which we have discussed except for Turco.

Do you know what these ten or thirteen other franchisees will testify as to what they did and how many orders they got and so forth?

MR. PERSON: I have interviewed each of them and I have not interviewed them in light of this. I have interviewed them generally about what happened to them and I have--

THE COURT: I am talking about damages now and the question is what was their sales potential even if they got interfered with.

MR. KAPLAN: We have taken some of those depositions.

THE COURT: Like whom?

MR. KAPLAN: Dougal and Cucci and Heim who are on that list.

THE COURT: What does he say?

MR. KAPLAN: Dougal and Cucci were partners. They ordered one car from Nabcor. They got it. They quit.

Heim is a piano teacher, a Bethlehem school teacher. If I remember correctly, he got all the cars he ordered too. He stared to try and run ads in the Allentown newspaper and he claimed to have had some trouble, and he sent out some mailings and I will never forget this testimony as long as I live. When asked why he stopped sending out mailings, he testified it was because he got tired licking the stamps.

THE COURT: All right, this one hundred is just a figure that could very well be a valid projection of what somebody could sell if they devoted the time and they were skilled salesmen, maybe they could sell a lot more. I don't know. But we are not dealing with an abstract thing; we are dealing with particular human beings that did what they did and that was the Nabcor franchise system in fact, not some theoretical franchise system, and the jury cannot consider what some theoretical franchise system could have gotten. It will consider if it ever gets to the jury, what the Nabcor system would have produced for Nabcor. I just think, Mr. Person, you have not got anything to go to the jury about potential business in anything like what you are talking about. And I don't even know what you have got at all about potential business.

I don't hink you have got anything to go to the jury about for the three people we talked about and if Heim and Cucci and whatever this-- Dougal, that was their situation. That is nothing to go to the jury about potential business, so I think four million is a zero and not a four million.

What about your twenty million? Where did you get that?

MR. PERSON: Well, based upon the, once again, it is based upon the sale of additional franchises.

THE COURT: Let's talk about franchises. How many franchises did Nabcor sell? I guess you told me earlier. How many? Have you got the numbers and the breakdown? How many of each kind?

MR. KAPLAN: I think there were nine master brokers, there were about thirty area brokers.

THE COURT: Nine master brokers?

MR. KAPLAN: 30 or 31 area brokers.

THE COURT: They sold the master brokers for what?

MR. KLEINBARD: It ranged.

MR. KAPLAN: It ranges quite a lot.

THE COURT: What is a for instance?

MR. KAPLAN: 25,000.

MR. KLEINBARD: All the way from 25 to 50.

MR. KAPLAN: I think the highest they got was about--

THE COURT: Between 25 to 50?

MR, KAPLAN: Ballpark number.

THE COURT: How many area brokerages were sold either by Nabcor or by a master broker?

MR. KAPLAN: About 31.

THE COURT: Who sold them?

MR. KAPLAN: Nabcor.

THE COURT: I thought the master brokers were supposed to sell--

MR. KAPLAN: We have tried to pin this

down in interrogatories over a long time. It was just a dribble of franchise sales by people other than Nabcor.

THE COURT: So 31 Nabcor area brokers.

MR. KLEINBARD: 6,250 to 7,500.

THE COURT: About 7,000, let's just say roughly.

MR. KAPLAN: I am sorry, 19 area brokers.

THE COURT: 19 area brokers?

MR. SILVERMAN: 19 sold to master brokers and 11 by others.

MR. KAPLAN: So a total of 30.

THE COURT: Wait a minute. What have we got?

MR. KAPLAN: Nine masters and 30 area brokers, 19 of which were sold by Nabcor and 11 by other people, other Nabcor franchisees.

MR. SILVERMAN: 266 brokers.

THE COURT: Okay. Now, what is the evidence about the sales potential there? Not some theoretical possibility. Okay, let's start at this end. How do you calculate the 9,114,462 figure?

MR. PERSON: Nabcor had sales of franchises for the years '68, '69 and '70 of $90,086; 147,143 and 149,258 and 99,000.

THE COURT: You have got an income figure of 485,000 down. You are giving us the breakdown of that?

MR. PERSON: That is the totals.

THE COURT: Okay, but you have got '67 through '70.

MR. PERSON: '71 is the fiscal year ending January 31 so it is really a '70 figure. It is for 1970.

THE COURT: 1967 in terms we have here was what? What was the figure?

MR. PERSON: 90,086.

THE COURT: 1968?

MR. PERSON: 147,143.

THE COURT: '69?

MR. PERSON: 149,258.

THE COURT: '70?

MR. PERSON: 99,051.

THE COURT: How do you get the nine million figure?

MR. PERSON: By ten percent of the

available franchises that Nabcor had as its structure.

THE COURT: How many franchises of different kinds? In other words, how many do you assume would have been sold?

MR. PERSON: 2,000 of the broker.

THE COURT: 2,000 broker bringing Nabcor what?

MR. PERSON: At 1,500?

THE COURT: How many master brokers or area brokers?

MR. PERSON: 200 area brokers at 7,500.

THE COURT: And?

MR. PERSON: Ten master brokers. That is really it.

Well, it should be 20.

THE COURT: 20,000?

MR. PERSON: 20 master brokers.

THE COURT: At what?

MR. PERSON: 37,500.

MR. KLEINBARD: That is the concept.

THE COURT: Over the whole period of time or just--

MR. PERSON: For a one year period.

THE COURT: For a one year period?

MR. PERSON: In other words, that the whole franchise system should have taken about ten years to fill out instead of having everything all at once it would have had to grow over a period of time of ten years.

THE COURT: So this is a per year--

MR. PERSON: Correct.

THE COURT: This is the total concept, only it is one-tenth of it for each year?

MR. PERSON: One-tenth of it.

MR. KAPLAN: I think the figures he gave you are the one-tenth.

THE COURT: He is saying this is per year.

MR, KAPLAN: Yes, quite so.

THE COURT: Now, the nine master brokers and 30 area brokers were sold over a period of 1967 through '70 so--wait a minute. What is the total number of regular brokers?

MR, KAPLAN: It appears to be 123.

THE COURT: What is it, Mr. Person?

MR. KAPLAN: I guess I would have to work with that figure.

THE COURT: All right, 123.

Again, we have such extravagant figures, it is unbelievable. We have got four for years, we have got an average of, if we take the four into 123, we have got about 30 brokers a year and you are projecting damages on the basis of 2,000 brokers a year.

And area brokers, you have got, if you take 4 into 30, you have to 7 and a half a year actually and you are projecting damages on 200 a year. On master brokers, if you take 4 into 9, you hafe got 2 and a quarter per year and you are projecting damages on 20. I think, you know, if I asked you and tried to pin you down as to what the actual expressions of interest were and so forth, I don't know what I would hear, but I don't think I would hear anything, or what would I hear?

How many deals were at any time really being discussed and about to be consummated and how many deals were called off because of a lack of supply of cars?

MR. PERSON: I don't think that we can establish that.

THE COURT: I don't think you can. I think that is very crucial.

How did you get the 20 million down at the bottom of the page?

MR. PERSON: That was based upon--

MR. KLEINBARD: Based on the population of the United States. So many per million people.

MR. PERSON: That was on the car income. That was a much larger sum reduced by competitive factors to an arbitrary point.

THE COURT: So it is an increased-- Okay.

I am not going to go into it.

Well, there is a lot of other elements, I guess on the next page.

Well, let's take the next one, 178,920 loss of gross profit on cars Nabcor itself would have sold, 1967 through '70. Cars that Nabcor would have sold directly?

MR. PERSON: Correct.

THE COURT: How many cars?

MR. PERSON: Six I think we told you about.

100 per year.

THE COURT: 100 per year?

MR. PERSON: Correct.

THE COURT: Okay. Well, you know, how many orders did Nabcor get that they were not able--of customers they were not able to fulfill?

MR. PERSON: Negligible.

THE COURT: So there is really no basis for that. The loss of the proceeds from the public offering, I am just going to ignore for the the moment.

MR. PERSON: And the Celena judgment.

I think we have a new and special problem here. We have an elaborate trial and I don't think we have got any damage, except just almost nominal damages to submit to this jury on anything I have heard in this.

MR. PERSON: I don't see how you can say it is nominal when they have sold $500,000 in franchises and they sold many cars.

THE COURT: My goodness, that is income. They got the $485,000.

MR. PERSON: To show that--

THE COURT: They cannot recover that.

MR. PERSON: To show that they were

capable. They also don't have that now as a result of the activities. In other words, that money was--

MR. KAPLAN: That money is in the Poconos and we all know it.

THE COURT: That is really very difficult to even conceive of anybody recovering against General Motors. Is there a motion to dismiss that would lie on the basis of the statements made on the record in this case?

MR. KAPLAN: I think so.

THE COURT: Because I think--

MR. KLEINBARD: A substantive--

THE COURT: You have got nothing but speculative damages going to the jury. There may be a few lost car sales, but I don't see what is really being sought. That is not what the case is about.

MR. KAPLAN: I think if your Honor took an offer of proof as to what the testimony would be, such a motion would lie.

THE COURT: I am sure from the defense--

MR. KLEINBARD: In effect, that is what we have been going through, your Honor has been asking what the proof will be.

THE COURT: I think this is a very abnormal situation. I just think that we have damage figures that are based on wholely arbitrary calculations. I would appreciate you going through this, because I don't have it all in mind. We have not covered every nook and cranny perhaps, but I think what we have is a situation where the damages have not either been thought out or whether there is just arbitrary calculations without--that really couldn't go to the jury in any possible way and I don't want to take some action here which will end up doubling our effort.

In other words, I wouldn't want to take some action which was sure to bounce back from the Court of Appeals where we had to start over again and I don't think General Motors would want that either. You want to make the best use of the effort that has been made, but I think this is a very abnormal situation and I think that we have got to think seriously about whether the trial should continue and if we are going to have a lot of evidence about testimony pro and con about this and that conversation, but we end up with the kind of damage proof we have suggested here, I think it is plain from the statements made and I think that Mr. Person has to be held to these statements for the sake of defining claims, that most of this, if not all of it, could never get to the jury.

This is not an injunction case, an injunction case won't get to the jury anyway. So I would appreciate your thinking about it and--

MR. PERSON: We had profits here and net income in '69, '70 and ending January 31, 1971 amounting to about $200,000.

THE COURT: Right, but what is the proof that you would have had more?

MR. PERSON: The projection of those profits.

THE COURT: This is just dreaming. This is just dreaming. I am utterly appalled at what I have heard. I have never seen anything like it. I don't want to ask anybody for any conclusions in this case, because I think we all have to think what is the best way to handle this in view of a number of circumstances and of course we have had a certain amount of time with the jury and that has to be considered.

MR. KLEINBARD: Your Honor, we nevertheless have this problem. Of course it is a problem that we ultimately will face, but with the dealers suddenly being interposed that we had not anticipated, we are having to devote time that we were not going to devote and therefore we are not able to do what I ordinarily would say we would be able to do in evenings in terms of preparing a motion to dismiss.

If we had 48 hours, I think we could prepare a motion to dismiss and then your Honor could see whether it satisfies you or not.

THE COURT: I don't think this is so much a matter of legal work as taking this record and analyzing it. I would think that we all know, that there is a certain standard of proof to get to the jury on damages and I guess maybe we want to for-- look again at some of the case law and so forth, so I don't want to minimize that problem, but what I am thinking is at least in my experience, I have never seen damage claims in quite this fashion and I would think that you could not permit a jury to talk about lost potential income in quite this situation.

There may be jury questions--in other

words, the record may have to be completed as to what Jamale did and Young did, Maybe part of the picture will be the kind of thing that you have referred to and that is not in the record right now and it is not stipulated, I suppose, but it is of course in as a deposition.

MR. KLEINBARD: You are referring to the Dougal depositions.

THE COURT: I am talking about the plaintiffs. Some of those and of course, that is their own admission and they are stuck with that and that is conclusive, I would think.

Some of these third party witnesses I guess are not on ther record right now, but maybe there are depositions.

MR. KAPLAN: That is right.

MR. PERSON: So if a person's history of income and sales doesn't mean anything, then what does?

THE COURT: It means a lot. It means they made that much money.

MR. PERSON: Then they can be expected to take in the same amount also.

THE COURT: But the question is if the jury finds that General Motors engaged in conspiratorial conduct, maybe that there is some modicum of damages that could go to the jury, but I am just saying to you, Mr. Person, that what you have done here is to present theories which I don't think could, so I would like to know the theory, if there is a valid theory, that would go to the jury. Let's have it and let's know it and let's cut the case to that and know what we are talking about.

But we are not talking under any stretch of the imagination of a 34 million dollar case. My guess is that if we are talking about any-think we are talking about a case of a relatively modest amount of thousands of dollars, because you have come forward with these calculations.

I say they are invalid and I would be prepared if the record is clear enough as far as your admissions, I would be prepared to state it right now and stick with it. But I don't--I have not gone over every nook and cranny and I don't know whether somewhere in the proof there might not be some valid damage claim for some amount of damages. But it seems to me that it was up to you and is still up to you to present a valid damage claim and not a lot of hocum based on a lot of arbitrary calculations so I would appreciate going through--I think it is virtually tragic to have a long complicated trial over a case that will end up worth what, a few thousand even if you lost? It is just really a piece of silliness as far as the court is concerned and everybody else and as far as Mr. Person is concerned, too.

He shoudl not want to do that.

But we have sat around here and as far as--maybe you knew all this, I certainly did not, and I think I have benefited from hearing it and I think we have got to figure out a way to get the case within some bounds somehow where it belongs.

I don't know how to do it.

MR. KLEINBARD: We will certainly do that, your Honor and I might just say in that connection we have a problem of costs, that if we were to be successful, might very well be levied on the plaintiffs for subjecting all of this to what we have been subjected to.

MR. PERSON: There is always summary judgment.

MR. KLEINBARD: It could amount to a

substantial amount of money so that if it was a judgment in a few thousand of dollars I don't know if there would be any net recovery for the plaintiffs at all.

THE COURT: If they won you wouldn't get costs.

MR. PERSON: But if they don't, we are talking about a potential the other way.

THE COURT: What costs do you calculate?

MR. KLEINBARD: The transcripts.

MR. KAPLAN: Based on my experience in the Celena case which was minute next to this, the bill of costs in that case was $32,000 and I would think it would be four or five times here.

MR. KLEINBARD: Deposition transcript, trial transcript.

THE COURT: You don't get all those deposition transcripts do you, unless they are used?

MR, KAPLAN: But they are going to be used here.

MR. KLEINBARD: In any event--

THE COURT: $120,000 worth of depositions?

MR, KLEINBARD: The trial transcript is

running about $3,000 a week.

THE COURT: That is daily copy, you don't get that.

MR. KAPLAN: We would move for it.

MR. KLEINBARD: I don't think we are going to decide that question in this case. I don't think that the Plaintiffs are aware of it. That is the only reason I throw it on the table because they should be aware of it.

THE COURT: I would appreciate--

MR. KLEINBARD: I cannot talk to them directly so I am mentioning it in front of Mr. Person.

THE COURT: You are analyzing this record. I think it is worth your effort.

MR. PERSON: Are you instructing them to make a motion to dismiss? Is that what you want to do?

MR. KLEINBARD: His Honor is telling us--

THE COURT: I am saying, Mr. Person, that you have come in after X number of days at the trial after voluminous trial preparation and I have asked you what your damage claims were and they are either all or almost entirely, totally invalid under any view I can conceive of in the proof and I am saying to you I did not expect this. I have never had it in any case which I have tried before and I say that as a matter of judicial administration. It is of grave concern to me and I say it is an abuse of the process of the Court and I am most interested in doing something about it.

Because there are other things to be done in this Court besides play the kind of games that are being played now in this case.

MR. PERSON: I am not playing any games.

THE COURT: This is an absolutely intolerable situation. These damage claims have no merit whatever, either entirely or almost entirely.

MR. PERSON: Do you find any relevance at all with any of them? Anything material here?

THE COURT: I am not prepared to say there is nothing. I am not prepared, because I don't know. But the trouble we have is there may be a case here but when somebody comes in and exagerates so grossly--

MR. PERSON: Is it not exageration.

THE COURT: And makes another case, one doesn't know whether there is a proper case, because there is such a vast amount of confusion, so that creates problems.

MR. PERSON: I see sales that are lost, franchises lost, sales of cars.

THE COURT: That is just talk. We have not had any indication of any evidence to support that. Maybe there is a dollar or two damages we have talked about. It is literally chicken feed.

MR. PERSON: Are you basing it solely on showing a car that--

THE COURT: We have gone through in great detail, I have interrogated you. The record stands. I don't know what this record means.

MR. PERSON: Also I have not had much time to put this together which I think I might have to add.

THE COURT: You have had six years to put it together.

MR. PERSON: I have had a couple of days now in order to meet--

THE COURT: If you did not come to trial--

you had an absolute obligation to organize your damage proof before you ever arrived here in Court and youhhave had a lot of time.

We will quit for the night. I am extremely concerned about the misuse of Court time for really no good purpose and I would like you to analyze this and see what.

MR. PERSON: You are asking for a motion

THE COURT: I am asking for all parties to analyze. I would hope that you would join in the analysis and become realistice as to what you damage claim is and whether you have any and whether, if you have got any, how much on some realistic basis.

That is what I asked you to come in for tonight.

Okay.

NATIONAL AUTO BROKERS CORP.,
et al.,
Plaintiffs,
vs. 70 Civ 5 421A
GENERAL MOTORS CORPORATION,
et al.,
Defendants.

Before: HON. THOMAS P. GRIESA, D.J.,
and a Jury.

New York, November 8, 1976;
10.00 A.M.

Trial resumed.

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(The following took place in the robing room.)

THE COURT: I think we have to keep pressing to get this case in manageable proportions, which I know everybody is doing. The thought that came to me after last night's meeting is this:

That regardless of conversations and so forth, that objective facts, and I think extremely important are the facts about orders received by Nabcor and sales they made. It not only goes to damages but goes to liability, and I assume the information about 700 cars or orders for 700 cars being received and at least 645 of them filled by Nabcor, is of overriding importance. I never appreciated the significance of that until last night.

When you put that in the context of the fact that Nabcor was not accumulating inventories, the beginning of that business was in the field and Nabcor would only respond and only have need to respond by way of getting cars if it got an order from the field.

So the real question about this doing was how many orders were coming in to Nabcor from the field? 700 came in over this perqod of years and at least 645 apparently were filled.

Now, the gap is 1/14th of the orders and when did that occur? That is really a tiny amount and I am just wondering if it wouldn't be good to have Mr. Maiorana describe order by order, when was this first order filled and when was the second order filled. It isn't done that way but that is a picture and it is not a matter of somebody getting up and saying he had a conversation with Belcher or this and that. That is black and white, in other words, just a chronology. That I think is almost dispositive.

Then the franchises, when were the franchises sold? According to what Mr. Person said last night, there were franchises sold in each and every year, so nobody was stopping the sales of franchises, nobody was stopping the activity of the franchises, and the brokers were out there and there is evidence I have heard to indicate that nobody was putting a damper on their activities to try to sell these cars, and if all ability to get cars were cut off at a certain point, you might say there was a damper. Maybe there is some evidence about a damper; I haven't heard it so far.

But I am just trying to grope for something to get this case down to size. Has anybody got a chart of all orders?

MR. KAPLAN: We are in the process of preparing that.

THE COURT: When do you think you will have that? I think that somebody, Mr. Maiorana can very well testify about that, and he is the head of the business and testify about what orders -- you were not able to tell me last night what orders they had been unable to fill. He must know and he was the head of the business, and if he doesn't know and there aren't any records, well, that is mighty important to know that, too.

MR. KAPLAN: I think by the end of the day a great deal of information on this subject will be out, especially when Anthony Maiorana gets on the stand.

THE COURT: How much cross do you have of Frank?

MR. KLEINBARD: I don't have very much more. I have to cover one or two conversations and a few subjects relative to what you are talking about, and I am through and Mr. Anthony Maiorana stayed at headquarters a great deal more than Frank, so he is the better person to bring out this information.

THE COURT: Do you have a chronology of all the franchises?

MR. KAPLAN: That will be in this morning, I think.

THE COURT: Then there is in evidence the manual that was used.

MR. KLEINBARD: The manual from which I quoted pages 14, 15 and 29, and I have another quote and Defendants' Exhibit WW, which is the black book containing various sheets that were given to Bolling and other master franchisees to help sell franchises.

THE COURT: Were the franchisees, the people who were being sold these franchises, were they warned, told we can't get cars?

rp5

MR. PERSON: The testimony has been that there were statements to them about difficulties with a manufacturer about a dealer who couldn't get cars.

THE COURT: Whose testimony is that?

MR. PERSON: I believe Frank Maiorana testified tothat.

HE COURT: Whom did he tell that to?

MR. PERSON: It was a general thing.

THE COURT: Why would they buy a franchise if there were difficulties?

MR. PERSON: I guess because Nabcor expected these difficulties could be ironed out.

THE COURT: What were they told?

MR. KAPLAN: We'll have testimony on that this morning.

THE COURT: Let's go.

(In open court)

(Jury in box)

THE COURT: Mr. Maiorana is not here. It's 10:20.

MR. PERSON: I can proceed with a reading of the deposition of Mr. Roche.

Your Honor, I have just been told he is here and he'll be right in.

(Pause)

FRANK MAIORANA resumed.

CROSS-EXAMINATION

BY MR. KLEINBARD:

Q Mr. Maiorana, from time to time Nabcor received inquiries from people who were interested in becoming Nabcor franchisees; is that right?

A Yes.

Q And some of those inquiries came in by mail?

A At times, yes.

Q Nabcor responded to those inquiries?

A They would have been turned over to our marketing men or whatever I assume we did to respond to the inquiries, yes, They would have most likely have been turned over to one of the franchise men for a follow up or we may have responded ourselves. It's possible.

Q I ask my associate to show you a group of letters which I have marked Defendants' Exhibit L6 for identification. I'm going to ask you whether these are copies of 47 letters you wrote on or about October 28, 1970 in response to inquiries from people about Nabcor franchisees.

THE COURT: How many letters?

MR. KLEINBARD: 47.

THE COURT: What was the date?

MR. KLEINBARD: On or about October 28. I believe they're all October 28, with the possible exception of one which might be October 29.

For your convenience, Mr. Maiorana, they are identical in text.

(Pause)

A Your question was?

Q Are these letters which Nabcor wrote in response to inquiries from prospective Nabcor franchises?

A They appear to be, yes.

MR. KLEINBARD: I would offer the exhibit as one exhibit.

THE COURT: Any objection.

MR. PERSON: I would like to comment --

THE COURT: Is there any objection?

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit L6 was received in evidence)

MR. KLEINBARD: Since the text is identical and short, ladies and gentlemen, I would like to read a letter to you. This is dated October 28, 1970.

(Mr. Kleinbard read to the jury from Defendants' Exhibit L6 in evidence)

MR. KLEINBARD: Your Honor, I would like to offer in evidence a document which I have preliminarily marked Defendants' Exhibit M6 for identification, which is a tabulation that we have made of the dates on which the inquiries to which Mr. Maiorana responded with this form letter, Defendants' Exhibit L6, were made. It shows from the documents furnished to us by Nabcor that on the average there was a delay of one year and five months between the time that an inquiry was made and this particular letter, form letter, Defendants' Exhibit L6, was written, and in some cases, a substantial number of cases, the delay was over two years.

I would like to offer that tabulation in evidence.

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit M6 was received in evidence)

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MR. KLEINBARD: Your Honor, I would like to also offer as Defendants' Exhibit X5 a chronology of the Nabcor franchise sales broken down by the name of the franchisee and the date when the franchise was purchased. It goes a little beyond the relevant period here. I will just comment that through December 10, 1970, it shows a total of 149 sales. I would like to offer that.

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit X5 was received in evidence)

THE COURT: Does this cover, Mr. Kleinbard, sales of franchises by Nabcor and also any sales of franchises by master distributors? You get what I mean?

MR. KLEINBARD: Yes.

MR. KAPLAN: It's tabulated from the copies of the franchise agreements that were provided to us by the plaintiffs. I think it includes some in both categories, that is, direct sales by Nabcor and some by Nabcor brokers. We don't know that it is complete. We have tabulated what they gave us.

THE COURT: In other words, the documents of Nabcor contain copies of some franchise agreements apparently sold by a master franchisee to a broker?

MR. KAPLAN: I believe that's right.

THE COURT: This is all the documents possessed by Nabcor on this subject?

MR. KAPLAN: That's our understanding.

Q Mr. Maiorana, you assert in your lawsuit that General Motors conspired with dealers to prevent Nabcor from getting cars; is that correct?

A Yes.

Q You claim that that commenced sometime in 1966?

A Yes.

Q And that it continued beyond the commencement of this lawsuit on December 10, 1970?

A Yes.

Q Sir, I will have my associate show you a document that has been marked as Defendants' Exhibit Z5 for identification. For your information, this was given to us in your answers to our second set of interrogatories as a document given to each franchisee prior to the time that each franchisee entered into a franchise agreement. This document was put out by Nabcor in 1968 and thereafter?

A I find it difficult to read it.

MR. KLEINBARD: Mr. Person, would you concede that in your answers to our interrogatories of the second set it says that Z5, Exhibit 5, was distributed from and after 1968?

MR. PERSON: May I see the answer?

MR. KLEINBARD: Surely.

MR. PERSON: No objection.

THE COURT: It will be received.

(Defendants' Exhibit Z5 was received in evidence)

THE COURT: What is it you are saying is stated in the answers to the interrogatories?

MR. KLEINBARD: That was shown or given to Nabcor franchisees prior to the time each franchisee entered into a franchise agreement with Nabcor or with a franchisee of Nabcor during the following periods -- and now referring specifically to the exhibit which I have offered, listed here as Exhibit 5 -- from and after 1968.

MR. PERSON: I have no objection to the whole document being introduced.

MR. KLEINBARD: I would like to read one sentence. It's the second paragraph and it reads:

The Nabcor system is not only welcomed by a majority of the rapidly growing auto buying public but by the manufacturers as well, since the results in greater sales as a result of the Nabcor brokers' personal contact and service.

I would like to redistribute to the jury, if

I may, Defendants' Exhibit 6, which had been previously distributed. I neglected to read one paragraph.

Ladies and gentlemen of the jury, it will appear on page 23 of the exhibit.

THE COURT: Is this the offering circular?

MR. KLEINBARD: It's a manual, your Honor.

THE COURT: Proceed.

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Q On the righthand side of that exhibit, page 23, the upper righthand side, the last full sentence:

"In our fourth year of operation Nabcor has experienced no difficulty in supplying its brokers with automobiles nor does it anticipate" --

THE COURT: What year?

MR. KLEINBARD: In our fourth year.

THE WITNESS: Where are you reading from?

Q I am reading on page 23, the last sentence of the upper righthand portion.

THE COURT: What exhibit?

MR. KLEINBARD: D-6. It is a manual, your Honor, that is the Nabcor marketing and administration manual, and I am reading -- which is copyrighted in 1969, I believe. This was part of a proposed answer to Question 3, and the answer is:

"In our fourth year of operation Nabcor has experienced no difficulty in supplying its brokers with automobiles nor does it anticipate any difficulty in the future. So there is no reason for worry about that particular point."

MR.PERSON: Are you going to ask him anything about that?

MR. KLEINBARD: I have nothing to ask the witness about.

MR. PERSON: I thought you were going to ask some questions.

THE COURT: I would appreciate having a copy of that whenever you can.

MR. KLEINBARD: It is in evidence, so you should have it.

THE COURT: Next question, Mr. Kleinbard.

THE WITNESS: Just a minute. Your Honor, he hasn't read this whole thing. I am having trouble reading it, but it states in here --

THE COURT: There is no pending question, Mr. Maiorana.

Next question, Mr.Kleinbard.

Q Mr. Maiorana, you had discussions with Mr. Strimple prior to his becoming a master broker, did you not?

MR. PERSON: He just wanted to point out something else here that you forgot to read.

MR.KLEINBARD: I didn't forget to read anything, your Honor.

I don't know whether the witness heard the question as a result of our conversation. Will you read the question to the witness, please?

(Question read.)

A Yes.

Q You initialed the master broker agreement, did you not, which is Defendants' Exhibit Y?

A Do we have the exhibit?

(Question read.)

THE WITNESS: Your Honor, I don't see this is a signed copy of the agreement.

THE COURT: Let's go on. Mr. Strimple did become a master broker?

THE WITNESS: Yes.

THE COURT: Let us go on.

MR. KLEINBARD: Is the witness unable to say whether he initialed it?

THE WITNESS: It is an unsigned document, Mr. Kleinbard.

Q I understand, but whether it is unsigned, are you able to identify it as your initials on the exhibit?

A I don't know.

THE COURT: Let's show it to him again.

What is your question, Mr. Kleinbard?

MR. KLEINBARD: Whether Mr. Maiorana did not initial each page of that agreement which is already in evidence as Defendants' Exhibit Y.

A There are initials here that could possibly be mine. It is not an agreement, signed agreement. I don't know whether this is the agreement with Mr. Strimple or not.

Q I am merely asking you about the initialing.

THE COURT: Where is the agreement?

THE WITNESS: I don't know, your Honor.

THE COURT: Did Nabcor have files?

THE WITNESS: Yes.

THE COURT: If this isn't it, where in the files is it?

THE WITNESS: It was produced to General Motors and they have all of our agreements.

THE COURT: Is there any question about this?

MR. PERSON: It doesn't appear to be complete.

THE COURT: Let's get the complete one right away.

MR. KAPLAN: We went through this at the deposition and he was unable since then to produce it.

THE COURT: If there is a question Nabcor will produce it. It had files and entered into agreements and where is it if this isn't the one?

MR. PERSON: I have a complete agreement here, your Honor.

THE COURT: Let's have it.

MR. PERSON: There was a page missing, that is the only problem.

MR. KLEINBARD: I have no objection to showing the witness what you have. May we mark this, your Honor? It is the first time I have seen this original.

MR. PERSON: Well, you are not implying we didn't produce that, I hope?

MR. KAPLAN: We are representing it, not implying it.

MR. PERSON: If you would compare it with the other, can I ask you how you got a photocopy of this document without seeing the other?

THE COURT: We are not going to wrangle about that.

MR. PERSON: There is just a page missing, that is all, the signature page.

(Defendants' Exhibit Z-6 marked for identification.)

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Q Mr. Maiorana, this may make it easier, as that is a signed copy.

A This is the original.

THE COURT: What was your question?

Q Whether he did not initial that Exhibit Z-6 on each page.

A Yes, I signed it.

THE COURT: Is that the agreement?

THE WITNESS: This is the agreement, and my signature.

Q Messrs. Bolling, Strimple and Kuhaneck and yourself on behalf of Nabcor, is that correct?

A Yes.

THE COURT: Are you offering that?

MR. KLEINBARD: I meant to offer that.

THE COURT: Received.

xx (Defendants' Exhibit Z-6 received in evidence.)

Q When you spoke to Mr. Strimple about becoming a master broker you showed him a written profit projection for that master broker agreement, did you not, Mr. Maiorana?

A This is a master broker agreement that we were using at that time. You spoke of something else, a profit projection?

THE COURT: Let's have the question read, please.

(Question read.)

A I would like to see a copy of the projection that you are referring to.

THE COURT: Would you read the question again and let's have an answer.

(Question reread.)

A I don't recall whether we had in 1967 a profit projection for master brokers.

THE COURT: That is the answer.

Q Let me ask you a question and see if I can refresh your recollection. Do you recall that the profit projection which you showed or discussed with Mr. Strimple stated that his income for the first year's operation as a master broker would be between $900,000 and $1,000,000?

A I don't recall that.

Q It is a fact, is it not, Mr. Maiorana, that Nabcor never leased or rented any automobiles?

A Yes.

Q I show you an exhibit whichhas been marked Defendants' Exhibit Y-5 for identification, and ask you whether that is your signature at the bottom of the page?

A It is blurred, but it seems to be.

Q Is that your answer, it seems to be?

A I don't know.

Q Did you sign such a document?

A I don't recall.

Q Did you submit the original of that document to the Chrysler Corporation in 1967?

A I don't recall.

Q Would you be good enough to write your name? I will give you a piece of paper, write it two or three times on a piece of paper.

A (Witness complies.)

MR. KLEINBARD: May I have that marked?

xx (Defendants' Exhibit V-6 marked for identification)

THE COURT: Is that the paper with the signatures?

MR. KLEINBARD: That is correct, your Honor.

THE COURT: Are you offering that?

MR. KLEINBARD: I would like to offer both of them, your Honor, yes.

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibits Y-5 and V-6 received in evidence.)

A Could I see this once more, please?

Q Which one do you want to see, the application for the leasing (handing to witness).

Mr. Maiorana, Defendants' Exhibit --

A Just a second. Did you give a date when this document was submitted? Was that part of your question originally?

Q Yes, I said some time in 1967.

Defendants' Exhibit Y-5 states that the applicant Nabcor operates in bona fide leasing and rental service 250 cars. Was that a true statement when you submitted the original of this document to Chrysler?

MR. PERSON: I object to the way he is phrasing it. Why don't you not make the assumption that he submitted it, since he testified he doesn't recall?

Q Do you recall submitting --

THE COURT: I will overrule the objection. Let's have the question read.

(Question read.)

MR. PERSON: I move to strike the latter part of the sentence.

THE COURT: Motion denied.

A We were negotiating for a leasing company, Colonial Leasing Company, in New York at that time, and I recall applying for a rebate for our attorney Mr. James Tracy, for a car that he purchased and in conjunction with the attempt to purchase Colonial Leasing Company in New York we may have submitted this application, and I think that was the number of automobiles that they may have had on lease at that time. Also attending was Mr. Gross, the accountant at that time.

MR. KLEINBARD: I move to strike the witness's answer.

THE COURT: It is stricken.

Will you read the question and may we have an answer?

(Question reread.)

A Nabcor did not have 250 cars in any type of leasing arrangement. We were attempting to get a leasing company.

Q Your answer is it did not have but you were attempting to?

A We were in the process of purchasing that. It did not go through.

Q On Defendants' Exhibit WW, which is in evidence, I direct your testimony to the fact that a copy of this qualified leasing company application form appears at page 68 of Defendants' Exhibit WW.

A Your question?

Q First, I'm pointing out it appears there.

My question is: The purpose for including a copy of Defendants' Exhibit Y5 in Defendants' Exhibit WW was to induce prospective franchisees to purchase Nabcor franchises; isn't that true?

A To be precise, no.

Q Was the purpose of including it to have prospective franchisees believe that Nabcor was a bona fide leasing company with over 250 cars actually engaged in leasing or rental services?

A No. We did not display it. You are showing us Mr. Bolling's book that he supplied to you. I think we should make this clear.

MR. KLEINBARD: We have been all through that. I'm not going to repeat, your Honor, that the testimony concerning --

THE COURT: If you are not going to repeat it, don't.

MR. KLEINBARD: The testimony how that document came to be distributed is already in evidence.

THE COURT: All right.

MR. KLEINBARD: I would like to read briefly from Mr. Maiorana's deposition taken on September 16, 1976 at which time Mr. Maiorana testified under oath as follows, at page 1473:

"Q Nabcor intended to resell cars in competition with franchised automobile dealers, isn't that right?

"A That's right.

"Q Anf if a dealer -as told that Nabcor was reselling or that the Nabcor system was a brokerage system, it would be apparent to that dealer that he might be selling cars to a company that would not compete with him; isn't that right?

"A That's right.

"Q And a dealer therefore could, and I stress could, and it would be he would, independently reach a conclusion that selling to Nabcor was against his best interest, couldn't he?

"A Yes, and osme did elect not to sell us automobiles."

Q Under the circumstances as they obtained in February of 1968, Mr. Maiorana, is it your testimony that Nabcor did not need a fleet certificate?

A That's not clear to me. Can you read that back?

(Record read)

A You'll have to clarify that for me. Under the circumstances that they obtained -- is that what I heard? In 1968? Who obtained?

Q I beg your pardon?

A Who obtained?

THE COURT: Are you referring to some earlier piece of testimony at this trial and asking him if that's his testimony?

MR. KLEINBARD: The witness has testified at some length as to what happened to Nabcor in late '67 and early '68. I am asking him, under the conditions that hehas described here on his direct testimony, is it his present testimony that in February of 1968 Nabcor didnot need a fleet certificate?

THE COURT: Please answer that.

A Yes. It's my testimony that we were not seeking a fleet certificate -- not need.

Q That's your testimony, Mr. Maiorrna, as your system originally was conceived; is that correct?

A That's my testimony as the problems existed in the latter part of '67 and the early part of '68, which you described in your question.

Q Your answer to that is that under those conditions Nabcor did not need a fleet certificate.

A We did not seek a fleet certificate.

Q That's not answering my question.

My question is: Is it your testimony that under the circumstances that then obtained, did Nabcor, in your opinion, need or require a fleet certificate?

A I'm a little confused by this.

THE COURT: I am too. It could have so many meanings. I don't think it's comfortable to sit here and wonder what it means? Need for what? I don't know.

Can we go ahead and be more precise or drop it?

Q Is it your testimony that in order to do business with General Motors franchised dealers in February of 1968 Nabcor required a fleet certificate?

THE COURT: Same problem.

Are you talking about in a formal sense, as a formal condition, ot what?

MR. KLEINBARD: As a formal condition.

Q I'll ask that question first.

A It was indicated to me by the dealers that a fleet certificate was required or they would not sell us cars.

Q Is it not then true that as conditions obtained in February of 1968 that Nabcor needed, in your view, a fleet certificate?

A No. We needed clarification by General Motors to all of their dealers that they could sell us cars without a fleet certificate in compliance with the injunction from the Supreme Court. That's all we needed, and that's all I was seeking.

Q When we adjourned you were describing your first conversation with Mr. Lowe, the gentleman who was in the Chevrolet region in the area of Washington, Chevy Chase?

A Yes.

Q After your first conversation with Mr. Lowe on or about July 31, 1969, did you call him from your Jenkintown office again?

A You made a statement that my first

conversation was July 31, 1969. I think we had some conversation on that subject before we adjourned and I said it was in that time frame. I did not say that that was my first conversation.

Q Whenever your first conversation was - let's leave that for the moment -- did you have a second conversation with him which took place shortly after August 1, 1969?

A I had two or three conversations with Mr. Lowe.

You again mentioned a date subsequent to August 1. I believe it was on August first or thereabouts.

Q Shortly after August 1. Do you agree with me?

A That I had a second conversation?

Q Yes.

A I'm talking about the time frame, Mr. Kleinbard, and you are giving me specific dates, like August 1 and July 31, or shortly after that. It might have been a little before. It was in that time frame. I'll agree to that.

I did have a second conversation, yes.

Q Did you call him from Jenkintown on the occasion of that second telephone call?

A I believe I called him from Jenkintown. I spoke to him from Jenkintown. He may have called me for that matter.

Q By the time you had your second telephone conversation with Mr. Lowe you knew that Matt Slap, the General Motors dealership from which you claimed the order for the Askew Corvette was placed, had taken the position that it had not submitted an order for the car with Chevrolet because it had not received a deposit; is that correct?

A Yes. That's true.

Q You claim in your second conversation with Mr. Lowe he told you the same thing, that the dealer was taking the position that Nabcor had not placed a deposit with it?

A I don't recall. There were discussions with Mr. Wright and Mr. Lowe. I don't recall whether I told Mr. Lowe that, or in which conversation, but I'm sure I discussed that with Mr. Lowe, that the minute General Motors got into it then the dealer had changed its position from telling me the car was expected momentarily or on a daily basis to the fact that they had not ordered it because we didn't give them a deposit.

MR. KLEINBARD: I move to strike that

portion of his answer which says that General Motors changed his position. There is no testimony that there was any prior communication with General Motors other than the first conversation with Mr. Lowe.

MR. PERSON: He's only telling what happened.

THE COURT: Let me hear the question and answer.

(Record read)

THE COURT: It's not responsive. I will strike it. Ithink Mr. Maiorana has a right to give the entire conversations with Mr. Lowe. I assume he was asked that by Mr. Person, but this is cross-examination and the answer should have some reasonable amount of responsiveness and not get off to some other subject.

I will strike it.

Q In your direct here at trial, Mr. Maiorana, you testified that in your second conversation with Mr. Lowe, here in Court, he made the following and additional comments to you -- and I'm reading from page 597 of the trial transcript, beginning with line 5:

"Q 'You are not an authorized dealer and General Motors, you know, is not supposed to be selling you automobiles. Had he'" -- and here you are referring to Mr. Askew, Nabcor's customer -- "'gone to a regular dealer he would have gotten his car.'"

And you continued at page 597, line 23 by saying that Mr. Lowe also told you and I quote:

"We --referring to General Motors -- are not in the business of selling cars to people who resell them."

And then at 599, line 2, you claim he said to you:

"General Motors is not supposed to be selling cars to you or to supply its dealers to sell to people who will resell them to customers."

Mr. Maiorana, you described this Askew incident in three communications to the department of justice. The first was on July 11, 1969, which has been marked as Defendants' Exhibit AAAA for identification; a second dated August 25, 1969, which has been marked Defendants' Exhibit 4B for identification; and a third, Defendants' ZZZ, dated August 1, 1969.

I show you those three letters and ask you if you did not send them to the Department of Justice.

(Pause)

THE COURT: They're in evidence. Let's

proceed.

MR. KLEINBARD: They are marked for identification, your Honor.

MR. PERSON: No objection.

THE COURT: All right.

MR. KLEINBARD: I am offering them for the limited purpose of contradicting Mr. Maiorana's testimony on direct.

MR. PERSON: I would like it for the whole purpose --

MR. KLEINBARD: May I finish my offer? That he had telephone conversations with Mr. Lowe in which he made the statements attributed to him by Mr. Maiorana which I have just read from his direct testimony and not, of course, for the truth of their contents.

THE COURT: Let's take the July 11 letter. Where is the reference?

MR. KLEINBARD: Under the July 11 letter there is a reference to the conversation, yes, to the incident, on the bottom of page 2.

THE COURT: Let me look at that, please.

(Pause)

MR. KLEINBARD: It carries over to the top of page 2.

THE COURT: Let me look at that, please.

(Pause)

MR.KLEINBARD: It carries over to the top of page 3.

THE COURT: On the August 25 letter where is it?

MR. KLEINBARD: On the August 25 letter the incident is referred to at the bottom of the first page, paragraph numbered 3 and carried over to the top of page 2.

T5 A What paragraph, Mr. Kleinbard?

Q 3.

THE COURT: I will receive them for the limited purpose that is proposed by Mr. Kleinbard, AAAA, ZZZ and BBBB.

MR. KLEINBARD: Right. The ZZZ is the only letter which mentioned a conversation with Mr. Lowe and Mr. Calan, and I would like to read that letter, your Honor, if I may.

THE COURT: All right.

xx (Defendants' Exhibits ZZZ, AAAA and BBBB received in evidence.)

(Exhibit read.)

Q Mr. Maiorana, you did not mention in your letter of August 1 to Mr. Leinsdorf that you had given Mr. Lowe the name of the dealer from which the car was purchased, did you?

A No. This was just some additional information, skimpy information that I dashed off quickly to Mr. Leinsdorf and all it indicates there were many conversations here with not only Mr. Lowe but other General Motors officials; some of the highlights of the conversations.

Q I gather the highlights were the upholstery and not that you had given the name of the dealer?

A I had spoken to Mr. Lowe and he knew the name of the dealer from Mr. Wright and he was checking a car for upholstery.

I don't know what conclusion you are trying to draw from this, but Mr. Lowe certainly knew that the dealer was Matt Slap Chevrolet because Mr. Wright told him that.

Q And you told him, too?

A I told him that, that is right.

Q During 1968, Mr. Maiorana, Corvettes were a limited production vehicle, were they not?

A I don't know. If I recall that year they continued to run Corvettes through the build-up period right through the summer and were still building Corvettes I think right through September.

They were an automobile that was let's say more in demand than the eaverage Chevrolet and we had to pay more for it.

Q That I think is what I was asking about. Isn't it true,Mr. Maiorana, during 1968 the production, no matter how long it went on of Corvettes, was a limited number of cars as compared to Chevrolet, for example?

A During 1968 or speaking about 1969?

Q 1968 and 1969.

A I don't know what General Motors' production figures were. I think in 1968 they sold 3,000,000 Chevrolets, and I don't know what their production for Corvettes was.

Q In 1969?

A In 1969, I think was that range. I don't know what their production of Corvettes was.

Q Are you telling me that you don't know that far fewer Corvettes were manufactured by General Motors than Chevrolets? Is that your testimony?

A I know certainly far fewer Corvettes were produced. I don't know what their market was and whether it was sufficient for the market or not is something for General Motors.

Q Indeed, Mr. Maiorana, you testified at the hearing at page 646:

"Q During 1968, Mr. Maiorana, Corvettes were a limited production vehicle?

"A I would say so, yes."

A I said that we had to pay more for them and they were more in demand, yes.

Q Isn't it true that the franchised dealers were able to sell all the Corvettes they could lay their hands on?

A I don't know that to be true. I would say that it was not true in many, many cases.

Q Many, many?

A Yes, many, many cases, just like Cadillacs. It was not true that Cadillacs sold all of the cars they could get. There are some areas --

Q The question was restricted to Corvettes for the moment.

A People do not buy Cadillacs and the Cadillac dealer has an over-supply.

Q Let's just talk about Corvettes for the moment.

MR. KLEINBARD: I would like to direct the attention of the Court and the jury to Defendants' Exhibit J, which is already in evidence, and to pages 3 to 5 thereof which indicates that from November 8, 1967, to at least August, 1969, Rohrer Chevrolet and not Matt Slap Chevrolet was getting Nabcor's Chevrolet business in the Philadelphia area.

THE COURT: Mr. Maiorana, have you got Exhibit J? Could you give Mr. Maiorana Exhibit J?

Q Now, is it your testimony that under these circumstances --

THE COURT: We didn't all have what you were saying.

MR. KLEINBARD: I was pointing out from November, 1967, to August of 1969 that Rohrer Chevrolet and not Matt Slap Chevrolet was getting Nabcor Chevrolet business in the Philadelphia area.

Then I was going to ask the witness a question.

THE COURT: Go ahead, ask the question.

THE WITNESS: Just a moment, your Honor. From November, 1968?

Q November of 1967 until August of 1969, that the source of supply for Nabcor Chevrolets were Rohrer and not Matt Slap in the Philadelphia area.

THE COURT: Any problem with that, Mr. Maiorana?

THE WITNESS: I see Matt Slap in here interspersed. I think we were ordering from both dealers, your Honor.

THE COURT: The jury can look at t'is. You have Rohrer and you have Matt Slap. The jury can see this.

THE WITNESS: There were more orders from Rohrer than Matt Slap.

THE COURT: Go ahead, Mr. Kleinbard.

Q Is it your testimony, Mr. Maiorana, that under these circumstances Matt Slap Chevrolet agreed to sell Nabcor a 1969 Corvette at a low markup without a deposit?

A The markup was not low. We werepaying more for Corvettes and the markup was, I believe, $500 over invoice.

Q I thought the whole idea of Nabcor was to buy cars of any make over a few dollars over invoice?

A I believe I testified in depositions and in the pretrial hearing that Cadillacs, Corvettes and Mark IV we had to pay more for and paying anywhere from $550 as high as $900 for Cadillacs over invoice, and we paid more for Corvettes.

Q How much more?

A Approximately $500 over invoice as compared to $25 or $50 over invoice.

That was for Corvettes, and we also paid for Mark IV.

Q The reason for that was these were a limited production model, isn't that right, Mr. Maiorana?

A I would have to make an assumption on that. I would say that they were in the greater demand and quite possibly they may have had limited production.

Q They were in demand and low supply, is that true?

A Yes, I would say so in certain areas, especially in the large cities and the suburbs they were considered what you would call hot cars.

And the rural areas and the more conservative areas they might have an oversupply. It is all according to the area and the circumstances, but the costs were higher to us for Corvettes. I stated that when you asked that question before.

Q Have you come to a pause?

THE COURT: Yes, he finished.

A I am finished, yes.

2 Q Now, indeed, Mr. Maiorana, didn't you claim that Mid-Town Chevrolet was obligated to deliver a Corvette to you for $25 over invoice?

A We have a contract with Mid-Town Chevrolet that called for $25 over invoice. I don't recall discussing at this moment a Corvette, and we are now talking about 1966.

At that time Corvette was not a hot car. We had bought Corvettes in the year 1966 for approximately $50 over invoice.

Q How many?

A I believe maybe one or two. We bought one or two from Wolfington Chevrolet before the build-out. I don't recall purchasing any more.

We had -- our supply was Wolfington and I believe we bought one or two from him at that price. It was not yet what was a hot car.

Q When did it, according to you, become a hot car?

A I would say that started in 1967, probably the Spring-Summer of 1967, 1968, and became a more desirable car for young people as a sporty car. In 1966 it had not.

Q Now, Mr. Maiorana, prior to the time that you spoke to Mr. Lowe and Mr. Calan as referred to in your letter here on August 1 about the Askew Corvette, Mr. Askew himself had written to Nabco cancelling the order and asking for the return of his deposit, had he not?

A Prior --

THE COURT: Let's hear the question.

(Question read.)

A He had complained to Mr. Wright of the --

Q Just give me an answer yes or no.

A I don't recall whether he cancelled his order or not.

Q I beg your pardon?

A I don't remember whether he cancelled his order or not at that time. He had complained to Mr. Wright.

Q Your answer is you don't remember?

A I dont remember the whole question at this point. There was a statement prior to August 1st and let's see if I can get it all in the time frame.

Q Mr. Maiorana --

A You are referring to five different dates and seven different people at one time in each question.

Q Look at Defendants' Exhibit SSS, which I believe is August 1, 1969, the only letter which mentioned the conversation with Mr. Lowe and Mr. Calan.

A Go ahead.

Q Could you repeat the question?

(Question read.)

A He may have, he may have. He complained to the --

Q All right, your answer is he may have.

MR. KLEINBARD: I offer in evidence Defendants' TTTT, a letter dated July 28, 1969, from Mr. Askew to Mr.Snyder.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit TTTT received in evidence.)

MR. KLEINBARD: I am just going to read the letter, your Honor.

(Exhibit read.)

Q In fact, Mr. Maiorana, these alleged conversations which you have testified to with Mr. Lowe and Mr. Calan were engaged in solely to try to extricate yourself from the consumer fraud department claim lodged against Nabcor and not to help Mr. Askew get his car, isn't that right?

A Absolutely not.

MR. KLEINBARD: At this time I would like to offer Defendants' Exhibit SSSS, which is a portion of the 1969-1970 Maryland Suburban Phone Directory, which gives the Chevy Chase office of Chevrolet and the telephone number as Area Code 301-657-2280.

MR. PERSON: I object on the ground it is not complete. No evidence that it is complete.

THE COURT: May I see it?

Objection overruled.

xx (Defendants' Exhibit SSSS received in evidence.)

MR. PERSON: It doesn't have Mr. Lowe's name there and I am sure he had a line.

MR. KLEINBARD: I ask that that be stricken, your Honor.

THE COURT: It is stricken.

MR. KLEINBARD: I would offer Defendants' Exhibit YYY, the Nabcor Jenkintown telephone bill from May through August of 1969.

THE COURT: Any objection?

MR. PERSON: No objection.

THE COURT: Received.

xx (Defendants' Exhibit YYY received in evidence.)

MR. KLEINBARD: My only comment there is there are no calls listed on these telephone bills to 301-657-2280. That is the telephone siwtchboard telephone number of the Chevy Chase office of Chevrolet.

MR. PERSON: I see one to 301-657.

THE COURT: In YYY?

MR. PERSON: Yes.

THE COURT: What date?

MR. PERSON: On May 21.

THE COURT: But you are presenting there are no calls to that number which is listed for Chevrolet?

MR. KLEINBARD: That is correct. We checked what the other numbers were.

THE COURT: Anything else? We ought to take our morning recess now.

THE WITNESS: Your Honor, I would like to answer this.

THE COURT: There isn't any question pending.

THE WITNESS: This is misleading, because I called on November 2 the operator, the Maryland directory operator in Chevy Chase --

THE COURT: What year?

THE WITNESS: This year, just last week.

THE COURT: There will be an opportunity for redirect. You just wait.

We will take our morning recess.

(Recess.)

(Jury in box)

BY MR. KLEINBARD:

Q You testified on your cross earlier that you owned all of the stock of Nabcor in 1968, I believe. I'm not entirely sure what the situation is going forward.

Did you continue to own it until some later date?

A Yes.

We didn't finish the Lowe question --

Q I finished.

A You intimated to the jury we made no calls. I would like to make a statement here that all calls to Chevy Chase -- and I have it from the Maryland directory operator -- are 202 calls. Their Washington calls would be listed as Washington calls. You could not dial 301 and get Chevy Chase. There are hundreds of sublistings in the Washington area and there are Arlington -- there is a whole host of offices that they have in the Washington area.

We also had other numbers besides this one. I would say I think I should bring that out, that the number you were looking for in your directory and in the evidentiary hearing I have checked. There are hundreds of sublistings and I did check, Mr. Lowe did have a separate number at Chevy Chase which was not the number you spoke of, and it was a 202 number.

THE COURT: Give us that number. We are not interested in hundreds of numbers. What number do you claim was Mr. Lowe's number? What did you call?

THE WITNESS: I called the directory operator, your Honor, and I asked for Mr. Jack Lowe that had the kidney operation a copule of weeks ago. And they didn't know of a Jack Lowe --

THE COURT: Back in 1969 what number did you call?

THE WITNESS: I don't know what I called, but the man that --

THE COURT: Did your office keep any records?

THE WITNESS: We submitted records.

THE COURT: You have phone bills, right?

THE WITNESS: Yes.

THE COURT: Have you looked at the phone bills to try to figure out what number is reflected on that phone bills that related to your call or calls to Mr. Lowe?

THE WITNESS: There are Washington numbers.

THE COURT: I'm not asking you that. There are lots of Washington telephone numbers and lots of people to call in Washington. I have not the faintest interest in that.

On your phone bills, what number is there that the calls to Mr. Lowe are reflected by?

THE WITNESS: I don't know what his private number was. It would have been a Washington number, not a Maryland number. It would nt be 301.

THE COURT: Mr. Maiorana, it's not a matter of what would have been. The telephone bills which you know have been related to this issue -- you have known that for some time. They are your telephone bills. I ask you, what numberor numbers on those bills relate to the calls that you say you did make to Mr. Lowe? If it was not 301-657-2280, what was it?

THE WITNESS: I don't know.

THE COURT: The answer is that he doesn't know.

THE WITNESS: It was not a 202 number.

THE COURT: Next question.

MR. KLEINBARD: I'm lost as to where we

were on direct. The witness began to make a statement.

THE COURT: You had not started very long. Start again.

Q I believe you testified on cross that you owned all the stock of Nabcor in February of 1968; is that right?

A I believe I testified that prior to going public I owned all of the stock.

Q Does that mean that whenever Nabcor was formed, sometime in 1966, until the time you went public, which I believe was sometime in '71, you owned all of the shares of Nabcor?

A I owned all of the shares with the exception of some shares to Anthony Maiorana, which had not been distributed.

Q So that the thousand shares of Nabcor were listed in your name; is that correct?

A Yes.

THE COURT: You say except some owned by Anthony?

THE WITNESS: I had committed to give him a certain amount of shares, your Honor, but they had not yet beendistributed to him.

Q I would like to read from your interrogatory answers that are dated April 21, 1973 and verified by you, schedule 11, page 18.

At the outset, at the beginning of 1966, Frank Maiorana owned 62.5 per cent after transferring an aggregate of 12.5 per cent of Nabcor to Stephana Maiorana.

Who is she?

A That's my mother.

THE COURT: When was that transfer, please?

MR. KLEINBARD: It does not say. It says at the beginning of 1966 Frank Maiorana owned 66.5 per cent (after transferring an aggregate of 12.5 per cent of Nabcor to Stephana Maiorana) -- which is 1/8 of the transfer; Rita Maiorana.

Q Who is she?

A My sister.

Q 1/8 ofthe transfer.

Rosalie Maiorana, Stephen Maiorana, James W. Tracey -- he's your attorney or was your attorney for Nabcor?

A Yes.

Q And Anthony Maiorana owned 25 per cent?

A That is what I stated --

Q On 4/21/1975, in your answers to interrogatories.

A You say I certified those?

Q That's right.

A Didn't you refer several times to my statement, that I referred to the pretrial brief Mr. Person had made up, because there were many mistakes and corrections in that brief that I had not read, and that I don't know, I don't recall, stating that at that time, Mr. Kleinbard.

MR. KLEINBARD: May I maek, your Honor, and offer the interrogatory that I'm referring to? I would like to offer the part that I have read.

MR. PERSON: No objection.

(Defendants' Exhibit W6 was received in evidence)

Q Mr. Maiorana, you will remember earlier that we showed you a financial guarantor statement which you submitted to GMAC, Defendants' Exhibit WWW, in which you listed one thousand shares of Nabcor as being listed in your name. It should be 625, should it not?

A No. This is correct. The information that is on that deposition is wrong. It will be brought out, I think, by my attorney, that the 12.5 per cent you stated was not issued to her, to Stephana. There was 4000 shares issued to her out of a total of 525,000 outstanding and they were all in my name as of 1970, so at that time this was correct.

Q That's dated in February of 1968.

A I could not have made that statement or I was misquoted in that. That's a mistake in the deposition. If I hae read it, I would have corrected it. I am sorry I didn't. I can't read 3000 pages --

Q You are using the word deposition. You mean interrogatories, don't you?

A Interrogatories.

MR. KLEINBARD: Your verification reads that Frank Maiorana being duly sworn upon his oath deposes and says, one, I am the president of Natural Auto Brokers Corpo., a Pennsylvania Corporation, one of the plaintiffs in the above entitled action, and I am the agent of that corporation for the purpose of answering the interrogatories served upon the corporation by the GM defendants dated December 31, 1974, and for making this verification.

2. I have read interrogatory No. 1 -- of which the portion that I read to you was a part, the answer to which was a part -- and the foregoing answer thereto is true according to the best of my knowledge, information and belief.

Q Did you verify the interrogatories I have read?

A That particular interrogatory was in error.

Q The question is did you do it?

THE COURT: It speaks for itself. Next question.

T7

Q Mr. Maiorana, in March of 1973 Nabcor filed a motion in this case for a preliminary injunction, did it not?

A Yes.

Q On March 8, 1973, you and your counsel, Mr. Person, attended a conference before his Honor, true?

A I dont recall the exact date, but, yes, we did attend several conferences with his Honor.

MR. PERSON: May I have a side bar on this, please?

(At the side bar.)

MR. PERSON: I think this is going to start a Colonial Cadillac all over again. We don't object, but we want to advise you that it looks as if we are getting into alleged representations that were made in order to try to obtain the preliminary injunction.

MR. KLEINBARD: I raise this, your Honor, on credibility, and that is my conclusion with this witness, that he made misrepresentations to the Court. Do you remember he was required to put $100,000 of his money into Nabcor to save it, which was based upon your Honor granting a hearing. At the hearing it was brought out that over $90,000-some-odd went in to Mr.

Maiorana and Mr. Anthony Maiorana's land in the Poconos. It is all in the record.

THE COURT: But that are you going to do, read part of the hearing?

MR. KLEINBARD: A very short part, unless he admits the issue. I will just read part of the testimony. It is all admitted here and in the hearing.

THE COURT: There are some clearcut things in the hearing?

MR. KLEINBARD: Right, which relate to the use of the three bank loans which comprise this approximate $100,000.

THE COURT: It doesn't relate to anything that was brought up thus far?

MR. KLEINBARD: Purely on credibility, but such a strong illustration as to credibility and credibility is such an important matter in this case that I would --

THE COURT: Aren't there some limits? In other words, something that happened that has been brought out so far? Do you bring it out and then show some contradictory statement on that? Can you do that?

MR. KLEINBARD: Sure.

MR. KAPLAN: Rule 608.

MR. PERSON: That raises questions as to the fact that it was said to you and the circumstances under which it was said, the question of the preliminary injunction.

MR.KLEINBARD: I think it is rather simple. He stated he the use to which certain proceeds were put and the use was not to advance the cause of Nabcor.

THE COURT: 608(b) you are thinking of?

MR. KAPLAN: Right.

MR. KLEINBARD: Let me tell you what I propose to show. I am going to read from the record that he said to you in court that things were so bad he had to put $100,000 of his money into Nabcor alone. I will then show out of his mouth that the proceeds of the three loans which constitutes the funds which were allegedly put into Nabcor went right again to repay him and his brother Anthony and to go into their other ventures, the land ventures, so that the hearing was obtained on frankly false representations to the Court. I believe your Honor so found, but --

THE COURT: I recall that vividly.

MR. PERSON: I will just point out the fact that it was not all cash, it was a commitment and the economic effect of that amount, and this is strictly going down the path that we will explore, but we will object to it and it will be a full explanation.

THE COURT: Fine.

This doesn't come in the right way, the statements that result in the whole hearing,and everything else should come out. The fact that we are going to a hearing without him telling on the spur of the moment --

THE COURT: Frankly, I think there is plenty of evidence without getting into that, and I don't agree with Mr. Person for one minute that this is going to be something that didn't come out the right way. It is clear as day there has been misrepresentations, but I am not convinced, Mr. Kleinbard, that we want to start raising issues which have not thus far been raised just to show inconsistencies.

I am going to sustain the objection as a matter of discretion.

MR. KLEINBARD: Then may we adjourn five or ten minutes earlier so that I can put on an offer of proof?

THE COURT: Sure. Maybe when we get to

A Yes.

Q Was Nabcor's business in obtaining automobile orders a recurrent or non-recurrant business activity?

A Recurrent business activity.

Q Was Nabcor selling franchises?

A Yes.

Q What type of business activity was that?

A That was a non-recurrant to a certain extent.

Q To what extent are you referring when you say that Nabcor's business of selling franchises was non-recurrent?

A In the event there was a failure on the part of a franchisee or for some reason he was forced out of business or scared out of business or whatever, we would then put in another franchisee, just like the automobile business itself when a franchise dealer dies or goes out of business, they replace that dealer with another dealer.

We would do that to the extent that it would be --

MR. KLEINBARD: I would just like to move to strike that portion which relates to the automobile business. I have no objection to what he is saying.

THE COURT: Motion denied.

Q Any point at which you contemplated that Nabcor's franchising activities would cease or virtually cease?

A Yes, except for the replacement when we had covered the United States based on the population, one broker to per ten thousand population, or two thousand area brokers, two hundred master brokers.

Q Do you know what the term gross profit means?

A Yes.

Q Can you describe it just briefly?

A Gross profit would be the profits made on a product or service prior to deducting expenses.

Q What type of expenses?

A Marketing expenses and administrative expenses.

Q Mr. Kleinbard has pointed out that Nabcor's income from its combined operations of selling franchises and selling cars was a certain amount of money, most of which was in the selling of franchises.

Can you explain why the gross profit for Nabcor during 1966 was essentially from selling franchises?

A Because we were just getting started in that particular area. We started actually with the franchise selling program in February. By the time we had some franchises and started to order some cars, the manufacturers went into the build-out and it wasn't until September we started ordering 1967 cars. This was the bulk of our orders and it started to accelerate in September, October, November, these orders, and we got about three or four hundred at that time, I think about three hundred orders. Most of those 2 cancelled out because of the stoppages and we had to put on quite a few franchisees and most of our income was from franchisees as opposed to the sale of cars because we didn't get them.

THE COURT: I would like to hear that answer.

(Answer read.)

Q What was the purpose of the franchising income, the amount that you received on the sale of franchises? What was Nabcor's purpose in selling franchises for money?

A Well, partly to defray the cost of training the franchisee, charge him for the use of our name, the development of the system and the use of our concept and the training we would give them and the materials that we gave him and so on and so forth and to make a profit on the franchise in the same manner that any franchise there is a profit made.

THE COURT: Keep your voice up.

A I may add that a franchise --

MR. KLEINBARD: Is there a question pending?

THE COURT: What do you want to add?

A The franchise had a provision in the franchise that the franchisee did get his money back based on the sale of automobiles.

There was a provision in the contract based on the sale of each car, he got $25 back until he sold a certain amount of cars and received his full franchise fee back.

So there was a refundable franchise fee based on performance.

Q But you were asking the franchisees to pay for the franchise?

A Yes.

Q Are you familiar with the way that some of the automobile manufacturers sell their franchises or have their franchises distributed?

A Yes.

Q Have you ever gotten a franchise from the factory?

A Yes.

Q Can you tell me what franchises you had?

A I had Ford, Chrysler and I was offered Pontiac franchises by General Motors.

Q Did any of the factories ask that you make any payment to the factory for the franchise?

A If there was no existing franchise --

Q Just yes or no.

A Yes.

Q What type of amount?

A It was based on the size of the dealership, the thing they called planning potential, based on the amount of cars they had, that you would sell in a given year based on the amount of cars that were in operation in your territory; zone of influence or whatever.

Q Can you recall any specific instance?

A Yes. You would have to buy parts, buy cars, have to invest in the building and buy signs, in conformity with the factory requirements.

THE COURT: I don't know what possible relevance this has.

Q Have you established a factory franchise?

A No, I bought an existing one.

Q What capital requirements were there to go into a factory franchise for you?

MR. KLEINBARD: Can we have at least an identification as to whether it was a General Motors franchise or not, your Honor?

Q Could you identify it?

THE COURT: I thought we had this before. I think it is self-evident, somebody is going to establish the salesroom, inventory, hire employees, have a service department, you have to have a lot more investment in some form than $5000 we had before, and it is evident.

Q Just as a ballpark figure, how much was needed to establish a factory franchise or buy one?

A From a quarter of a million dollars to two or three million dollars.

MR. KLEINBARD: I object unless he is referring to a General Motors franchise.

THE COURT: Overruled.

Q The Nabcor franchise sold for substantially less than the amount that you indicated that the factory franchise often went for.

Could you explain why there was such a difference in price?

THE COURT: Mr. Person --

MR. KLEINBARD: I object.

THE COURT: Sustained.

Q Could you compare what your broker was to any individual or other entity within the factory franchise system? Was the broker comparable to any person?

A Yes, to a salesman in a factory franchise.

Q Have you ever hired salesmen?

A Yes.

Q About how many salesmen have worked under you?

A Over the years a couple of hundred, I would say.

Q Do you know how many cars a salesman on the average is expected to sell in a factory franchise?

MR. KLEINBARD: I object.

THE COURT: Sustained.

Q Was your area broker comparable to any --

THE COURT: I don't know why there isn't an objection to the phrase "comparable." It is meaningless and misleads the jury and doesn't mean anything to me.

If you want to have testimony about specifics of how Nabcor functioned, what its brokers in fact did, you are entitled to do it. Bring in those brokers and let's hear what they did.

If you want to bring in the master broker, bring him in and let's hear what they did.

This general thing about somebody being comparable to somebody else is meaningless.

Q Did your agreements require the area brokers to have supervisory power over another broker?

A Yes.

Q Did anyone in the dealership ever have supervisory power over a number of salesmen?

THE COURT: Mr. Kleinsbard, I don't know why there is no objection.

MR. KLEINBARD: I did object, your Honor.

Q Mr. Kleinbard brought up the fact of which we have complained in this action, that Nabcor brokers had obtained so few orders from Nabcor and can you explain why this occurred?

THE COURT: I don't understand.

MR. KLEINBARD: I didn't do that at all. I took the plaintiffs' figures of orders and said that is what it is, what it talks about.

THE COURT: Let me hear the question again.

(Question read.)

THE COURT: I don't understand the question at all.

MR. KLEINBARD: I object to the form.

THE COURT: You really mean that Nabcor orders cars from brokers.

MR. PERSON: Mr. Kleinbard pointed out that Nabcor took orders received from its own brokers, and when you divided the number of orders by the number of brokers and further divided by four years, it added up to about one car per year.

THE COURT: Where is that in the record?

MR. PERSON: In the last day.

THE COURT: Let's get it so we know what we are talking about. On Thursday?

MR. PERSON: Yes, your Honor, I believe so -- on the day before that.

THE COURT: Is there a reference?

MR. PERSON: It was Wednesday, your Honor.

MR. KLEINBARD: I think it's page 1120, your Honor.

THE COURT: I believe I see it.

Average less than one car per year per broker.

I recall that now. That refers to the figure of $700-odd contained in Exhibit 450 presented to Nabcor by its brokers.

What is your question?

Q Can you state why the number was as low as Mr. Kleinbard calculated?

MR. KLEINBARD: I object to that.

THE COURT: Sustained. Sustained as to form.

Obviously you want to bring in specific evidence, competent evidence, as to the sales potential of brokers and prove it in specific ways as to what their potential is and why they didn't get any more orders than they did. That's relevant. It's not a matter of Mr. Maiorana's opinion or general statement.

MR. PERSON: I wanted to go into that.

THE COURT: It depends on what was going on with the brokers.

Q In Defendants' Exhibit B6, this is the Nabcor area distributor projection which Mr. Kleinbard had read some information about in another lawsuit, the question was in essence, how did you base your projections for these number of orders which you have projected that a broker could obtain?

A From my experience in the automobile business for over 20 years, one broker in an area of 10,000 population could, handling all makes and all models, and following our program of solicitation to give him 50 exposures a day, 1250 exposures per month over 25 working days per month, he must, based on my experience as a general manager, as a sales manager, a new car manager, and whatever, he must sell a minimum of 20 automobiles per month by accident.

And these projections do not reflect 20 per month. They're conservative. They reflect only five automobiles per month for the broker.

Q Did you have statistics in any of the dealerships on which you have made any of these projections?

A Yes.

Q When you were asked under oath in the Mesirov litigation concerning any statistics that Nabcor then had in its possession you answered no. Was that answer truthful?

A No. I misunderstood it.

Q Did you have any statistics in Nabcor's possession at the time you answered the interrogatory?

THE COURT: I don't know what we're talking about.

MR. PERSON: There was a reading of the Mesirov litigation concerning Mr. Maiorana's non-production of documents that underlie the Exhibit B6.

THE COURT: The question is, did you have documents underlying B6?

THE WITNESS: And B6 is what?

THE COURT: The Nabcor area distributor profit projection.

Did you have documents underlying that projection?

THE WITNESS: That projection, yes. I had factory documents, Ford materials that I had, and Chrysler materials I had had from when I was in the automobile business.

THE COURT: You used them in preparation of the area distributor profit projection; is that right?

THE WITNESS: Yes, and my own experience.

and the projections I made each and every month with my sales managers and salesmen over a period of 20 years.

Q Who was Mesirov?

A Mesirov was a broker that bought one of our franchises in the Philadelphia area.

MR. KLEINBARD: Your Honor, I object to this on the ground it's not within the scope of this hearing.

THE COURT: Sustained.

MR. PERSON: I would like to be able to show what the litigation was about.

THE COURT: It has no materiality as far as I can see. It was simply an excerpt from a deposition read simply for purposes of alleged impeachment and that's that.

MR. PERSON: I reserve the right to bring up his name again at a time when it's more appropriate.

THE COURT: If it becomes relevant, yes. If it's genuinely necessary for him to explain why he made the particular answer in the Mesirov deposition, then he can explain it, but that does not open the door for a long discussion of another case. If it's a matter of explaining he didn't remember or he was unprepared or something like that, he can make any relevant explanation, but that will not involve a discussion of the substance of that other litigation. We have enough to worry about with this one litigation.

BY MR. PERSON:

Q Mr. Kleinbard referred to losses shown in your financial statement for 1966. Was 1966 your first year of operation?

A Yes.

MR. KLEINBARD: Objection.

THE COURT: Objection overruled.

Q Was 1966 your first year in operation?

A Yes.

Q Had you had business experience before?

A Automobile business?

Q Yes.

A Yes.

Q Are you aware of what results a new business can normally expect in its first year of operation?

MR. KLEINBARD: I object. I don't believe he is qualified.

A Yes, I am.

THE COURT: I don't think this is helpful. I don't think anybody could be qualified to talk about businesses in beneral, the first year. The question is what was the situation here.

MR. PERSON: I'm trying to show that --

THE COURT: That's not the issue. The issue is not whether it would be normal to expect that. The issue was whether it was correctly represented in a document furnished to General Motors. This is irrelevant.

THE WITNESS: Your Honor, it was agreed that we would compare franchises --

THE COURT: Agreed between whom?

THE WITNESS: In this court here when I asked your Honor, and Mr. Kleinbard brought up the fact that a factory franchisee must invest hundreds of thousands of dollars, and we were not a rich operation and we were in big for eight years; we were trying to salvage this business and I asked the Court --

THE COURT: Mr. Maiorana, there is no question pending and I will not receive this kind of argument. I have made a ruling on a piece of evidence and that's that.

Q Do you know whether factory franchise dealerships are ever unprofitable?

A Yes. Many of them are.

MR. KLEINBARD: I object.

THE COURT: Sustained.

Q Do you know whether factory franchise dealers go out of business each year to a certain extent?

A Many.

THE COURT: Sustained.

MR. KLEINBARD: I move to strike the answer.

MR. PERSON: Don't answer until there is a ruling, please

THE COURT: We'll adjourn for the noon recess.

The jury will go out and I'll talk to the lawyers.

(Jury out)

THE COURT: We have a mass of irrelevancies: Questions asked by Mr. Person and the answer by the witness before there is an objection. Practically every question is objectionable. It's a continuation of the same pattern of just a lot of useless information which is being poured into the jury's ears.

MR. PERSON: I think it's necessary to offset the effect when they call him a fraud for having a franchise system.

THE COURT: They did not call him a fraud for having a franchise system.

This is another example, Mr. Person. It is so hard to come to grips with the case because you misstate the issues, you misstate the arguments of the other side, and then you answer with the wrong issue and the wrong argument.

There are lots of problems here but not the one you mentioned as far as the 1966 earnings. I suppose in theory that the 1966 earnings might be relevant. I want to go back to that.

The point there was that in early 1968 Mr. Maiorana had filled out a statement, submitted to General Motors Acceptance Corporation stating that his net worth was such and such a figure including $600,000 or so for his stock in Nabcor.

Mr. Kleinbard showed him a January 31, 1968 statement showing a negative net worth in Nabcor and either a loss for that fiscal year or a nominal profit.

Mr. Maiorana came back and said that Mr. Kleinbard was misleading the jury because although January 31 had passed when he filled out his guarantor financial statement, in fact Mr. Maiorana didn't have the statement showing the results because the statement was not dated until April.

Then Mr. Kleinbard came back to that and said, well, this was a statement for the fiscal year ending January 31, 1967, so I assume that showed a negative net worth, either a loss or a nominal profit, so we were back in 1966.

I asked whether there were any figures at all that were used in calculating -- we were either talking about the Dun & Bradstreet --

MR. KLEINBARD: That also came up.

THE COURT: Anyway, Mr. Maiorana said he didn't use any figures at all.

I don't want to take a line of questioning like that and get into a general discussion of what people experience in the first year of operation, whether they are nuclear power plants or boutiques or what, so something more relevant needs to be presented.

What that something is and might be, I don't know. That's up to you, but it is not relevant to simply say -- I suppose the implication is that somebody might have a bad first year but a promising future and of course that's true.

MR. PERSON: I was trying to say that.

THE COURT: The second year was not all that good either.

THE WITNESS: We had problems.

MR. PERSON: I was trying to go through one year at a time. I wanted the jury to understand that net worth doesn't mean that a company is necessarily going to prosper. All companies experience negative net worth. You can't start off without expenses so you are losing money immediately.

THE COURT: You may be able to approach it in another way but comparing the Nabcor broker system with licensed franchised dealers is absolutely of no utility in this case whatsoever. If you want to have redirect of Mr. Maiorana to get to the point of this case which is what in fact was his operation, what in fact were the orders received, what in fact were the Nabcor brokers doing out there to produce business, the subject we discussed last night, that's all fine, but the other stuff is becoming more and more extraneous.

THE WITNESS: Your Honor, can I --

THE COURT: We'll adjourn.

MR. KLEINBARD: Do you want me to make the offer now or --

THE COURT: Make it now.

MR. KLEINBARD: Incidentally, you asked for a copy of this.

THE COURT: Thank you.

THE WITNESS: Your Honor --

THE COURT: Mr. Kleinbard is handing me a statement called plaintiffs' damage claims and I'll have this marked Court Exhibit A. It is the document which was the subject of discussion at the conference last night.

(Court's Exhibit A was marked for identification)

THE WITNESS: Your Honor, can I make a statement?

THE COURT: What?

THE WITNESS: It might be relevant to this case.

THE COURT: Yes.

A My business was an entirely new and different business, untried, had never been in existence before, and if I can't bring out what the competition was which every business has to take into consideration when it makes its projections and goes into business and invests money -- it has to take its competition into consideration, and if it had the price advantage and other advantages, we must have comparisons so that I can show how my business would have prospered. I have not been allowed to say this.

THE COURT: If this were a meeting of the New York Security Analysts and we were analyzing your business prospects and your competitive situation, it might have great interest, but we're not involved in that as far as I know, right at the moment at least.

THE WITNESS: I am an expert in the automobile business and I have --

THE COURT: I think there are many things you would have to say that are of great interest in other contexts, but we're trying a lawsuit.

I assume you have heard about the meeting last night and I'm going to tell you that the damage claims are so appallingly fictitious that I just cannot express to you what I feel about the impoisition that you and your attorney are perpetrating on this Court by coming forward with damage claims and other claims which are proving to be more and more fictitious and groundless.

circular.

MR. PERSON: Iwas assuming that it had some basis when he made it. I wasn't trying to suggest that he didn't find that information somewhere.

Defendants' Exhibit WW is the guarantor financial statement and it states at the bottom, "1000 stock shares Nabcor, Inc. estimated value on on unlisted per share and the total value, $600 per share, total value $600,000."

Q Did you ever have any offer to buy any stock of Nabcor?

A Yes.

Q Could you describe what offers you had and when they occurred?

A I had an offer by Earl Stewart --

MR. KLEINBARD: I object to this, your Honor, hearsay.

MR. PERSON: It is going to show the accuracy of his statement.

THE COURT: Was that the basis for your putting this $600,000 figure down?

THE WITNESS: Yes, your Honor.

THE COURT: You were asked before what the basis was. I don't recall your mentioning Earl

Stewart.

THE WITNESS: It was an arbitrary figure. I did say, however, that it was based on that because the --

THE COURT: You are saying it is based on what?

THE WITNESS: The offer by Earl Stewart of a half-million dollars for two-thirds of the business which made the whole business worth $750,000.

THE COURT: It would be interesting just to see what the testimony was before that, if we can pause a moment.

MR. KLEINBARD: Page 670, your Honor, of the hearing transcript.

THE COURT: I am talking about the trial transcript.

MR. KLEINBARD: 1290, your Honor, at the bottom of the page.

THE COURT: This occurred in Mr. Kleinbard's cross and he read testimony from the preliminary hearing:

"Q How do you place a value of $600,000 on your shares of stock in Nabcor which value was put in your financial guarantor statement?

"A It was just an arbitrary figure based on the system that could be extremely valuable. The Senate and Justice Department were involved in an investigation at that time and if we got relieved from that, that might be valuable. It was based on an arbitrary figure on the value of the stock."

Then there were questions about whether you had any figures on which you base the $600,000 valuation, and I asked you at 1273, "What figures did you have with respect of Nabcor stated at $600,000?"

"A It was just a statement based on the concept and system which I just placed an arbitrary value on."

THE WITNESS: Yes, your Honor.

THE COURT: Now you tell us you base that figure on an offer by Earl Stewart?

THE WITNESS: Yes. That was the arbitrary figure, the main part of it. I was offered a half-million dollars, as I testified in the preliminary hearing here, for two-thirds of the business. That would have made the entire business worth $750,000.

I put an arbitrary figure of $600,000 on the entire business, so that -- and if I remember in the preliminary hearing I discussed that it was an extremely low figure, a half-million dollars for two-thirds based on this concept that would have taken apart the automobile distribution system, and when I put in this estimate here, I was having some problems, so I just lowered it arbitrarily.

But the system in my mind had a value, I had an offer, and I felt that is what it was worth.

MR. KLEINBARD: I renew my objection, your Honor.

THE COURT: Overruled.